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ROSCOE POUND

Introduction

MUCH DEPENDS ON WHAT IS MEANT by comparative law and to what ends study and teaching and exposition of comparative law are to be directed.

While in form our law is chiefly the work of judges, the part played by text writers in the development of American law in its formative era in the forepart of the nineteenth century cannot be ignored. To no small extent judges put the guinea stamp of the State's authority upon propositions which they find worked out for them in advance. Much of their creative work is a work of intelligent selection. Bentham says that law is made by "Judge and Company", meaning that counsel, by their arguments, have much to do with judicial making and shaping of the law. But counsel, in our formative era, read and referred the courts to text books, and the text writers of that time under the influence of the natural-law philosophy, drew heavily upon comparative law. Reception of the common law of England and reshaping it into a common law of America had been well begun by the time of the Revolution. When John Adams was studying law before the Revolution, Jeremiah Gridley, "The father of the Boston Bar," told him that a lawyer in the new world had more to learn than an English lawyer. In addition to the common law he must study the civil law and natural law (i.e., the treatises of the eighteenth-

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EDITORIAL NOTE: The following works dealing with comparative law have been published by the author.

Books: Outlines of Lectures on Jurisprudence, 5th edition, 1943. Lectures XXV-XXXIII have to do with comparative law; The Formative Era of American Law (1938). Lectures on the Occasion of Celebration of the Centennial of the Death of Edward Livinston.

Papers in legal periodicals: "The Influence of French Law in America," 3 Illinois Law Review (1909) 354 (French translation by Jules Valéry, 44 Bulletin de la Société de Législation Comparée, (1915) 390; "Classification of Law," 37 Harvard Law Review (1924) 933; "Comparative Law in the Formation of American Common Law," 1 Mémoires de l'Académie Internationale de Droit Comparé (1928) 183; "The Revival of Comparative Law," 5 Tulane Law Review (1930) 1; "Hierarchy of Sources and Forms in Different Systems of Law," 2 Mémoires de l'Académie Internationale de Droit Comparé, Part 2 (1934) 9; "A Comparison of Ideals of Law," 47 Harvard Law Review, (1933) 1, (also in 2 Mémoires de l'Académie Internationale de Droit Comparé, Part 4 (1935) 200); "The Place of Comparative Law in the American Law School Curriculum," 8 Tulane Law Review, (1934) 161; "What May We Expect from Comparative Law?" 22 American Bar Association Journal (1936) 56; "The Influence of the Civil Law in America," 1 Louisiana Law Review (1938) 1; "The Development of American Law and Its Divergence From English Law," 67 Law Quarterly Review (1951) 49.

century law-of-nature school). After the Revolution a deep and widespread depression set in. Those were days of strict foreclosures and imprisonment for debt. Naturally lawyers, who at such a time were largely engaged in collecting debts, became the object of demagogical attacks which extended to the law. Moreover political conditions had an equally bad influence. The public was hostile to all things English, and it was impossible for the common law to escape the odium of its English origin. New Jersey, Pennsylvania, and Kentucky legislated against citation of English decisions in the courts, and there was a rule of court against such citation in New Hampshire. A large and enthusiastic party, which soon became dominant, not only distrusted all things English but was enthusiastically inclined to French law. There was much agitation for an American code to be drawn up on French lines. This had a marked effect for a time, especially in New York. In the older reports, speaking from the earlier part of the formative era, there is an unusual and significant number of references to the writers and authorities of the civil law, and great deference is paid to those authorities.

Thus at the very beginning of independent development of American law, comparative law became an influence. Kent and Story, who stand out as judges, teachers, and doctrinal writers during this period, made themselves learned civilians and were thoroughly well read in the continental jurists of the law-of-nature school. They used comparison with Roman law and the writings of the civilians to reinforce rules and doctrines of the common law. Kent, who became Chief Justice of New York in 1804, tells us that when his colleagues, who were Jeffersonians and inclined to deprecate rules of English law and ask what was the French law, hesitated, he would overcome their objections by showing that the civil law reached the same result as the common law and that each was in the particular case declaratory of natural law. Story used the civil law and comparative law in the same way and with like effect in establishing equity on the basis of the decisions of the English chancellors.

Even more than English common law, English equity was unpopular in the beginnings of independent America. For more than one reason the Puritan was a consistent and thorough-going opponent. Equity ran counter to all his ideas, relieving fools instead of requiring them to act freely and then holding them for the consequences of their folly; acting preventively instead of permitting free action and imposing after the event the predetermined result; and above all involving discretion in its application to concrete cases, which in the Puritan view meant superiority in the magistrate, in that it allowed him to judge another by a personal standard instead of by an unyielding and universal legal rule. Accordingly, there

was vigorous opposition to the Court of Chancery in England until at least the middle of the eighteenth century. In America, Massachusetts and Pennsylvania granted equity powers to their courts grudgingly by a process of piecemeal legislation, and the state courts were reluctant to extend the jurisdiction of equity even where there was no more than application of familiar principles to new conditions of fact. Had English equity been expounded to American readers in the dry and technical fashion of the contemporary English treatises, the development of equity in the United States might have been arrested. As it was, Kent upon the bench and Story in his treatises, gave a sympathetic exposition of English equity. They referred continually to the Roman law, postulated as embodied reason, and to the civil law as developed Roman doctrine, making it appear, untruly as we know now, that English equity was essentially Roman law and was a body of universal principles of justice. Thus they assured the reception and development of what became a characteristic feature of our administration of justice.

Comparative law played a like part in the development of commercial law in this country. The work of absorbing the law merchant into the common law was by no means complete at the time of the Revolution. Lord Mansfield under whom the process was substantially completed, was on the bench at that time. But the law which, after the Revolution, was recognized as "the common law in force at the time of the Revolution," was the law of Blackstone's Commentaries and so the law as it existed before the decisions of Lord Mansfield had settled the principal questions of mercantile law. His decisions and the common-law decisions after his time had a controlling influence in America, as repeated citations of them in Johnson's reports bear abundant witness. But American judges were left more to their own resources in this important field than in any other. Being left largely to their own ideas of what was or should be the law and having been taught by Blackstone that there was a universally applicable law of nature of which the positive law was declaratory, and having been taught to find the law of nature in translations of the continental treatises, they naturally looked to the French and Dutch (in Latin) treatises on the civil law and the French treatises on commercial law and largely cited and approved them. Yet there are cases in the New York reports of the formative era in which Pothier, the chief French doctrinal writer of the eighteenth century, was cited by counsel but the court took a different view on the basis of English decisions.

At a critical time, Story's treatises on the important subjects of commercial law appeared, and for a time the vogue of comparative law came to an end. The Anglo-American is averse to authorities in a foreign tongue.

As the courts grew stronger, as the prejudice against law and lawyers and English law books disappeared, the citation of French treatises diminished and finally vanished.

Later comparative law had a renewed vogue in America with the development of systematic ideas in connection with a general reception of English analytical jurisprudence. When in 1826 John Austin was offered a professorship of jurisprudence in the then newly established University of London, knowing that the common law had had little systematic development whereas the Pandectists in Germany had given the modern Roman law a high degree of systematic exposition, he went to Germany and studied the Roman and civil law and analytical and historical science of law. His lectures at London between 1828 and 1832 were the foundation of analytical jurisprudence in the English-speaking world and gave what seemed a scientific basis in comparative law for the much needed systematizing of English law. From the seventeenth century Roman law was regarded as part of the foundation of study of law. Grotius, who was read in colonial America, as John Adams tells us, and was read by ambitious students in America down to the Civil War, regarded Roman law as embodied reason. In Continental Europe, it was not only the basis of systematic exposition of law, but as put in legislative form by Justinian it had been received into the body of positive law of the more important states. Their law was a product of the universities. From the sixteenth century it had been highly systematized in great treatises and had been codified at the end of the eighteenth and beginning of the nineteenth century. Our law was a product of the courts, taught at first in the medieval societies of lawyers which still control the upper branch of the profession in England, and from the sixteenth century till well into the present century studied by a sort of apprentice system of reading in the chambers or offices of practitioners. As our law began to be taught and law teachers began to write textbooks, a need of system began to be felt. Having little of our own beyond alphabetical abridgments, the rambling commentaries of Coke's Institutes, and Blackstone's exposition in terms of writs in a general overall classification adapted from the Roman instititutional books, we turned to the systematic treatises of Continental Europe. For the greater part of the last century, we sought to push the doctrines and precepts of the Anglo-American common law into modern Roman systematic categories where too often they did not fit. Those of us who studied law in the last decade of the nineteenth century and those who were teaching law fifty or even forty years ago can remember when our books expounded the law of public utilities on a theory of contracts between public utility and patron or of a legal transaction of professing a public

calling, insisted on contractual theories of agency, urged a subjective theory of contract, and opposed any ground of tort liability other than culpable causation. The quest of system outside instead of finding system within our law was in some measure useful in providing models until we were able to work out systematic ideas and categories for our own institutions and doctrines. But new problems, which arose in the transition from a rural agricultural to an urban industrial society, required creative handling. We came to see, after no little hard experience, that attempt to mold the common law to alien systematic ideas stood in the way of a useful science of law instead of providing one. Little but harm came from distortion of common law doctrines and precepts in order to fit them into supposed universal systematic ideas worked out in the modern world from Roman materials.

A comparative law which found supposed universal systematic categories and principles in the writings of the Pandectists had behind it an idea which had come from the law-of-nature jurists of the seventeenth and eighteenth centuries. They held that all positive law, every detail of the body of authoritative norms or patterns of decision, was simply declaratory of a natural law to be ascertained or demonstrated by pure reason. This universal ideal law, to which the positive law was to be made to conform, was a body of detailed precepts applicable to all men, in all places, at all times. In finding the details of this universal law, they assumed that Roman law, meaning thereby the system of law obtaining generally in Continental Europe, built chiefly of Roman materials, was embodied reason. This idea of natural law and of the modern Roman law as declaratory of it, was part of the education of the American lawyer as late as the time of the Civil War. My father, who began study of law in 1859, left me the books he bought and read diligently as a student. In addition to Blackstone, Kent, Coke on Littleton and Coke's Second Institute, there were Grotius, Burlamaqui (1747) in translation, Rutherforth's Institutes of Natural Law (1754–1756), Vattel (1758) in translation, and Montesquieu (1748) in translation. As has been said above, comparison of doctrines and precepts of the English common law with Roman and modern Roman doctrines on the same subjects was made an effective instrument in the development of American law in our formative era by Kent and Story, who had made themselves learned civilians. But as our law came to maturity, this type of comparative law could not maintain itself. Kant had undermined its philosophical foundation, and the analytical jurisprudence, which Austin had built on universal systematic ideas drawn from Roman and English law, gave way in the latter part of the nineteenth century before the historical jurisprudence which

Maine built on Savigny. But there is one idea left to us by the law-of-nature jurists which is not wholly lost and we cannot afford to lose.

Revival of natural-law thinking is a manifest phenomenon in juristic thinking today throughout the world. Even if the lawyer confronted with practical problems of adjusting relations and ordering conduct of individuals urging conflicting and overlapping claims and expectations, which thus far have so frequently and persistently admitted of no practical treatment beyond compromises based on experience developed by reason and reason tested by experience, derives no help from a broad theory of all law as applied morals and consequent ideal law derived from reason or from reason and revelation as behind every detail of the authoritative models or patterns of decision in the politically organized society of today, there does nonetheless appear to be a certain universal element in law. This appears particularly with respect to certain fundamental expectations of men involved in life in civilized society. There seem to be general jural postulates of life in civilized society. If I understand Radbruch's last book aright, he came from his Neo-Kantian development of antinomies of the ideal relation among men, the highest development of individual character, and the general security, to a doctrine of certain fundamental presuppositions of life in civilized society. The provisions in recent constitutions for effective securing of bills of rights or declarations of rights are only one example of a growing feeling that there are fundamental expectations or wants which an effective social engineering must contrive to satisfy, without ignoring other expectations or wants which men in varying degrees in time and place assimilate to them. Even if natural law as a complete and self-sufficient solvent of all the problems of a legal order has not maintained itself, natural law has still a certain validity of no mean importance as a way of putting a universal element of a regime of justice, which, whether it is to be referred to reason or to experience, is becoming apparent as we study the efforts in Soviet law to dispense with it.

We turned to comparative law in the formative era of American law when we were engaged in overhauling the received English common law to discover what part of it was adapted to the political, social, economic, and geographical conditions of the New World and how what we took over could be developed for the purposes of administering justice in that world. We turned to it again, as our law had attained stability, in order to systematize it for teaching and exposition and thus make it an assured foundation for a juristic new start as new problems of administering justice began to confront us in a complex urban, industrial society. We are turning to it again today when a newer and broader idea of justice seems

to be calling for rethinking the idea of security as an end of the legal order. What I have called the humanitarian path of legal development, a path directed to a broader conception of security seems to be indicated for a time when a crowded world has ceased to afford boundless opportunities which men only need freedom to seize in order to be assured of satisfaction of their reasonable expectations. Where opportunities of freely exercising one's will are abundant, security means an ordered competition of wills in which acquisitive competitive self assertion is made to operate with a minimum of friction and waste. But where an ordered struggle for existence does not leave opportunities at hand for everyone, where the conquest of physical nature has greatly increased the area of wants and expectations without corresponding increase in the means of satisfying them, equality ceases to mean equality of opportunity. Security ceases to mean security in freely taking advantage of opportunity. Desire for an ideal relation among men leads to thinking in terms of an achieved ideal rather than of means of achieving it. Instead of thinking of men as ideally free to attain that relation, we think of them as already in that relation. The ideal of a world in which all men instead of being free to attain that relation are found already in it, I have called the humanitarian ideal. There is much in what is going on in the law today which suggests that legal development is moving in the path toward this humanitarian ideal.

Eras of creative law making have been eras of juristic philosophical method. Legislative law making, judicial law finding, and doctrinal inquiry into what should be law, proceed with reference to ideals of the end or purpose of the legal order and of the ideal relation among men which politically organized society is to promote and maintain. Hence the side of the science of law which has to do with the ideal element in the body of authoritative materials of decision is likely to occupy the major part of the attention of jurists in eras of growth.

Called upon for a new purpose, comparative law must take on a new form in the stage of legal development which appears to be ahead of us. It can no longer be confined to analytical and historical exposition of the precept element of the authoritative materials of deciding controversies.

It takes no deep inquiry into the judicial process in action to show that its course is to no small extent determined by ideals with reference to which starting points for legal reasoning are chosen from a number of equal authority, by ideals which determine what is reasonable, by ideals by which the "intrinsic merit" of competing interpretations is determined, and by ideals which lead tribunals to extend one precept by analogy and restrict another to the bounds of its four corners. Some of these ideals have

traditional authority from having been received in the thinking and understanding of lawyers and judges. This authority is quite as legitimate as that of traditionally received precepts. Sometimes they have been assumed in a long course of teaching and writing so that lawyers and judges, perhaps for generations, have as a matter of course assumed them as criteria of valuing claims, deciding between competing interpretations, choosing from among possible starting points for juristic reasoning or competing analogies, and determining what is reasonable and just. Sometimes this body of received ideals is referred to in the lists of *subsidia* in codes or in authoritative or semi-official exposition of the codes.

I long ago came to feel and have often argued that such received ideals are a part of the law itself; that they are as much a part of the law as the authoritative, received, traditional precepts. It is true of all developed systems of law. It is equally a mistake, on the one hand, to set off the ideal element as something of independent validity above the rest of the materials for the guidance of judicial and administrative action, as in the seventeenth and eighteenth century systems of natural law, and on the other hand to set it off in order to ignore it, as did the analytical jurists of the last century.

If we admit such an element as a part of the law, we may compare received ideals in time and, as it were, in space. We may compare the ideal element in one age with that in another. We may compare the ideal element of one system of law of one time with that of another system or other systems in the same time. If we do this and compare the authoritative techniques received in different bodies of law and the modes of applying them, this along with the established comparison of authoritative precepts and doctrines as it has gone on in the past, will yield a complete, well-rounded comparative method well worthy of a place among the received methods of the science of law. Such a method is needed in the economically unifying world of today and will be needed even more as we achieve the more complete unification that will overcome the nationalism we have inherited from the sixteenth century.

Thus the comparative law that goes beyond, though it will include comparison of codes and of their provisions in detail, comparative critique of legislation as it goes forward everywhere, and comparative critique of doctrinal writing everywhere, answers to a great and growing need of the administration of justice in the world as it is coming to be. As in the formative era of American law it had a place in the training of the practising lawyer, in what will be the formative era of a world law it must take its place again in legal education. As a member of a profession practising a learned art, the lawyer should have not only a general culture but cul-

ture in his own vocation which today calls for a learning beyond the system he is to practise. Certainly there is a minimum here which should find a place in his training. Moreover there will be some who in the course of general practice under the conditions of today will have need of an intimate knowledge of the law of some country other than their own. To acquire this so as to make it useful they will need a background of comparative law to enable them to appreciate the technique of developing and applying legal precepts which will give meaning to the provisions of codes and doctrinal discussions they will have to study. But we must differentiate between the learning required by a general practitioner and that demanded of a teacher and law writer. The practitioner may well acquire what of comparative law is part of the training of a learned lawyer from competent teaching of the system of law which he is to practise when done by teachers who know how to use their knowledge of the rival system of law to make more effective their exposition of their own. The teacher, on the other hand, should have a thorough grounding in the law he teaches based on a sound understanding of the systematic, the technique, and the historical development of each of the two great systems of law which divide the civilized world. Informed knowledge of this will bear fruit continually in discussion of the problems which exposition of the details of either in the light of newly pressing interests and new phases of old recognized interests increasingly raise in the society of today.

One thing more. On many former occasions I have urged the need of reconstruction of international law for the purposes of a world legal order. Lack of an international law adapted in its fundamental concepts to the world it is to govern is a serious obstacle to development of an effective legal regime of universal justice. An international law worked out originally for absolute personal rulers and thinking of democratically organized peoples, under constitutions distributing the powers of government and guaranteeing fundamental individual rights, in terms of such personal rulers, is out of touch with the relations it must adjust and the conduct it is to order.

Undoubtedly the law which is to adjust the relations and govern the conduct of peoples in the unified world order of the future will be able to and must use the experience of three centuries under the Grotian system. But it should be able to and should use also the experience of the law governing private relations within the state and of individuals with the state during the same period. It is not that all of this is to be taken over whole and in detail. It should be used as Grotius used the experience of Roman jurists in the classical era of Roman law, as set forth in Justinian's Digest. Grotius, it is true, did not use this as experience. Under the influence of

the law-of-nature thought of his time he assumed that the Roman texts were declaratory of natural law and in the main embodied reason. What reason had shown as the precept of natural law governing the relations and conduct of Titius and Maevius and Seius could be made to apply to the relations of Philip and Louis, and Ferdinand and James. Grotius purported to use the Roman texts as reason. But they were opinions upon actual cases and commentaries upon them. They were systematized experience. The experience upon which we must in part proceed in building an adequate international law should be worked over well by a fully developed method of comparative law. In this way we shall be able to identify and bring out the universal element in experience of administering justice which will be usable for a world justice.

On all accounts we must welcome a competent periodical devoted to comparative law at a time when there is great work to be done to which it may contribute much.

HESSEL E. YNTEMA

The American Journal of Comparative Law

THE ESTABLISHMENT OF A JOURNAL devoted to comparative, foreign, and private international law responds to an apparent need in the United States at the present time. The central consideration—that these branches of legal knowledge are indispensable to adjust law intelligently to the new conditions, national and international, of the changing world in which we live—is persuasively emphasized in the preceding *Introduction* contributed by Roscoe Pound. While thus there is no call to justify the American Journal of Comparative Law as a means to promote comparative legal studies, a brief statement of its purposes, background, and scope is appropriate.

The purposes in view, corresponding to the practical and scientific objectives of comparative law, are twofold: on the one hand, to encourage *general* investigation of legal problems, whether theoretical or empirical, as essential to the advancement of legal science and, on the other, to provide information respecting foreign legal developments, as increasingly requisite in legal practice and for legal reform. That these, the scientific and the practical, are complementary aspects of law, both of which require attention, has been recognized in the organization of the Journal, which is designed to provide a forum in which academic scholarship and the practising bar can provide mutual assistance in the examination of basic or current legal problems on a comparative basis.

More specifically, on the practical side, the massive evolution of the domestic economy and, during the twentieth century, the enormous extension of the foreign interests of the United States, concomitant with the increasingly significant role which the country, despite prior isolationist preconceptions, has had to assume in world affairs since the first World War, has imposed upon the legal profession of the United States widely enlarged responsibilities. It is no longer feasible for those who are concerned with the complex problems of private as well as public law that inevitably arise not merely in connection with the foreign commerce of the United States and the effort to establish an international legal community, but also in considering proposed legislation and legal reform in the domestic scene, to ignore or misestimate what is happening in other

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parts of the world. To conceive these matters intelligently, to enable the lawyer and the legal scholar to deal with the new and acute problems of today in their international setting, adequate sources of information and appropriate training so that the sources can be duly apprehended, are needed, lest the intelligence and devotion which the legal profession of the United States has so conspicuously exhibited in the administration and development of the domestic laws, may not have to operate in considering these problems, as it were in a vacuum, without sufficient understanding or without the relevant facts. This need it is the purpose of the American Journal of Comparative Law to subserve.

A supplementary purpose is to enable representatives of the United States to participate more effectively in the comparative examination of common legal problems in conjunction with representatives of other countries. The value of exchanges of ideas among jurists at the international level is recognized in frequent international conferences in which it is incumbent on the legal scholars and interested members of the bar of the United States to participate and to which due attention is to be given in the pages of this Journal.

For example, the importance of international co-operation in this sphere, attested by the "wide consensus of informed opinion that a progressive internationalization of the social sciences is one of the great educational, scientific, and cultural needs of the present age,"[1] has inspired the recent establishment of the International Committee of Comparative Law by UNESCO, as a part of the program to develop international institutes or centers of social science. Pursuant to the recommendation of the Conference of Experts held in March 1949, affiliated national committees to correlate the activities of institutions and individuals concerned with the study of foreign and comparative law are being formed in various countries. In response to this development, the American Foreign Law Association, which constitutes the national committee for the United States, has been expanded on a national basis to include legal scholars as well as practitioners and is also organizing branches outside of New York City. On the technical aspects, the American Journal of Comparative Law will be in position to make an important contribution to the activities of the Association in this connection.

From the academic or scientific viewpoint, what for practical purposes is a desideratum, appears a downright necessity—that is, if the study of law in the United States is to be conducted in a scientific and not merely a dogmatic manner. It seems plain enough in reference to the physical

[1] "Draft Proposals for the Establishment of an International Institute of the Social Sciences," 1 International Social Science Bulletin (1949) 68.

and also other social sciences (except perhaps to the Soviets) that a nationalized science, e.g., a Dutch physics or a Swiss sociology, would be an absurdity. The same is true of law. Legal science, as Ihering and every other responsible scholar who has expressed himself on the matter has declared, is necessarily general; a local or national science of law is a *contradictio in adjecto*. This is only to say that, under modern conditions where the existing laws are almost entirely national, comparative law is an essential function of legal science. The halcyon days when objective consideration of legal problems was propitiated by an international community of justice, are past at least one hundred years.

In this regard, the interest in comparative law developing in the law schools in the United States[2] gives encouragement, but there is still much to be done to provide sufficient training and facilities for comparative legal studies. The simple truth is that, in this country even more than elsewhere, the emphasis in legal education and legal research is concentrated upon the domestic laws. To repeat an earlier observation, still germane, "Although from early days the United States has played a more or less significant role in the evolution of the law of nations, in the sphere of private law the development of a national legal system within the multifarious structure of the federal union has virtually eclipsed effective participation in efforts to attain unity of law on an international scale. Despite sporadic interest in foreign legal ideas, the legal system of the country has developed without systematic efforts to correlate its progress with other legal systems, including in recent years even the British, with which there is fundamental affinity. This particularism, which is by no means peculiar to the United States, is attributable to various conditions —the prodigious mass of legislation to be assimilated, the professional emphasis in legal education, the lack of information concerning the laws of other countries, as well as the economic self-sufficiency and political isolation of America until recent years."[3]

There is no need to belabor the point, particularly since a number of the leading law schools are making serious efforts to remedy the situation. These efforts deserve every encouragement; indeed, they doubtless should be extended in scope. Thus, as has been pointed out by Ernst Rabel, who as the former director of the celebrated comparative law institutes in Munich and Berlin is in position to speak with experience and authority, similar developments are much needed in this country to stimulate and

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[2] Cf. J. R. Stevenson, "Comparative and Foreign Law in American Law Schools," 50 Col. L. Rev. (1950) 613–628.

[3] Yntema, "Unification of Law in the United States," in International Institute for the Unification of Private Law, Unification of Law, Rome (1948) 301, at 317.

focus comparative legal studies;[4] it is to be hoped that one or more of the institutions interested will be able to provide for this need before too much time passes. In addition, in the existing system of legal education, more attention should be given to the basic disciplines, indispensable for comparative understanding of legal problems—training in foreign languages, in Roman law and the modern civil law systems, in related subjects, including legal history and legal theory, not to speak of other legal cultures. For the great majority of the thousands of our law students today, all this is mostly *terra incognita*, the exploration of which is increasingly sacrificed to the exigencies of a progressively more modernized, more specialized, and more nationalized course of study. It is symptomatic that, as revealed by a recent survey, in the area studies which have been developed by the universities to train qualified personnel for the extra-territorial interests of the United States, law is poorly represented.[5]

This trenches upon fundamental issues respecting legal education—whether the course should be dominantly professional or also scientific; how much emphasis should be laid upon the cultural aspects of law and its relations to other social sciences; or upon creative as contrasted with exegetic research; in fine whether lawyers should be trained for public service as well as for practice; and the like. These issues can scarcely be discussed here. Suffice it to say that, quite apart from the inherent and really practical values of training in comparative and other scientific branches of law, the distinctive influence of the legal profession in political and international affairs makes it highly desirable that the broader and more basic aspects of law should not be left to a few specialists, but that also, as was indeed true a century ago, every prospective member of the bar should be given at least a glimpse of these exciting realms, if only to counteract the indifference that ignorance might breed and the impression that the horizons of legal science in a rapidly revolving world are as narrow in time and space as a purely technical curriculum might otherwise suggest.

In the attainment of these purposes, it has been conceived that the American Journal of Comparative Law may usefully serve to co-ordinate and promote the activities of the law schools and of the legal profession generally in comparison of laws and the study of foreign and private international law. Obviously, it cannot substitute for these activities, which indeed need to be expanded as above suggested; its function is supplementary. More especially, the Journal provides a national medium in

[4] Rabel, "On Institutes for Comparative Law," 47 Col. L. Rev. (1947) 227.

[5] Bennett, Area Studies in American Universities, New York (1951) at 16, 35.

which information of concern to comparative legal science or to the solution of the complex legal problems arising from international commerce, may be made available, not only to legal scholars and specialists in these matters, but also to the many present and prospective members of the bar whose intellectual interests, or indeed whose practical affairs, may extend beyond the boundaries of the United States.

For some time, the need for such a development has been all too obvious. Since the short-lived annual *Bulletin* of the Comparative Law Bureau, edited by William W. Smithers, appeared from 1908 to 1914 and thereafter once in 1933, there has been in this country no appropriate publication enabling the American lawyer, as was observed in the first issue of the *Bulletin* to "add to his forensic forces those supporting powers which can be derived only from the knowledge of the law as a science, its fundamental principles as manifested in comparative jurisprudence, its place in history, its influence upon civilization, and its vital importance to our own national life."[6]

In other countries, starting in Europe, the need for journals providing a forum for comparative legal ideas and information has long been effectively recognized—indeed, since 1829 when Mittermaier and Zachariä, stressing the unity of European science and culture, inaugurated the first such journal devoted to foreign legal science and legislation.[7] Among the many legal periodicals currently published, that are more or less exclusively devoted to matters of comparative interest, the following may be particularly mentioned: in France, the *Bulletin de la Société de Législation Comparée*, initiated in 1869 and in 1949 merged with the *Revue Internationale de Droit Comparé;* in Great Britain, the *Journal of Comparative Legislation and International Law*, issued by the Society of Comparative Legislation since 1896 and recently combined with the *International Law Quarterly* as *The Comparative and International Law Quarterly;* in Belgium, the review first issued for 1908 by the Institut Belge de Droit Comparé and since 1949 published as the *Revue de Droit International et de Droit Comparé;* in Germany, the *Zeitschrift für ausländisches und internationales Privatrecht*, established contemporaneously with the Institut für ausländisches und internationales Privatrecht founded in Berlin by Ernst Rabel in 1926 and first appearing in 1927; and in Italy, the *Annuario di Diritto Comparato e di Studi Legislativi*, founded by Galgano in Rome in 1927. Similar publications have been established in a

[6] Comparative Law Bureau of the American Bar Association, 1 Annual Bulletin (1908) 5.

[7] Kritische Zeitschrift für Rechtswissenschaft und Gesetzgebung des Auslandes (discontinued in 1856). For a compact survey of comparative law periodicals, see David, Traité Élémentaire de Droit Civil Comparé (1950) 447–452.

number of Latin-American countries; in Mexico, for example, the *Revista de la Escuela Nacional de Jurisprudencia* founded in 1939 and the more recent *Boletín del Instituto de Derecho Comparado de México* in 1948, both giving excellent surveys of contemporary legal developments, and in Argentina, the publications of the Instituto de Derecho Comparado of the University of Córdoba, are typical of the extensive attention given to comparative legal studies in the chief South American countries.

In the organization of the Journal, it has been sought to enlist the cooperation of the institutions and individuals that are especially qualified and interested to participate. In order to provide the necessary funds to cover the basic costs of publication and to enable the business affairs of the enterprise to be effectively conducted on a joint basis, a corporate patron, the American Association for the Comparative Study of Law, Inc., was formed under the laws of New York, on September 17, 1951. As a nonprofit corporation, it is qualified to receive gifts not only to support the Journal but also to provide for the special needs of comparative legal research. As declared in the Certificate of Incorporation, the purposes of the Association are "to promote the comparative study of law and the understanding of foreign legal systems; to establish, maintain, and publish a comparative law journal; and to provide for research and the publication of writings, books, papers and pamphlets, relating to comparative, foreign, or private international law."

The principal class of members of the Association is composed of the institutional "sponsor members,"[8] thus far including those whose representatives on the board of editors are listed on the cover of this issue. Each of these institutions by virtue of such membership is a party to a joint Agreement with the Association, prescribing the terms under which the Journal is to be prepared and published, and is represented by a member on the board of editors of the Journal. Various other institutions have indicated interest in the undertaking, and, as they are in position to do so, it is hoped that they may participate.

These arrangements contemplate that the primary responsibility for, and control of, the Association and the Journal is vested in the law schools and the American Foreign Law Association as sponsor members. In addition, the By-Laws provide for sustaining, subscribing, and corresponding memberships. Through these memberships, law schools which do not desire to participate as sponsor members, as well as individuals, law firms,

[8] Under the By-Laws, "any school or institute devoted to comparative, foreign, or international law, any member school in the Association of American Law Schools, bar association, or other school, institute, association, or corporation deemed by the Board of Directors to be qualified, may be elected a *sponsor member*."

or corporations, interested in supporting the purposes of the Association, may effectively share in the activities of the Journal and contribute materially to the development in the United States of this important area of legal study.

All this—the creation of the Association, the establishment of the Journal, and the enlargement of the American Foreign Law Association—has involved a deal of planning. A primary consideration has been that, in the absence in the United States of a "center" of comparative law, such as has been established at Paris, or of a well-staffed institute such as that organized at Berlin in 1926, it is desirable to pool resources, to enlist the co-operation of both the interested members of the bar and the law schools and other institutions concerned. Consequently, to work out an effective basis for the Journal, it has been necessary, among other things, to find a relatively stable and responsible means to secure the basic costs of publication and editing, independent of outside control; to reconcile the diverse interests of practitioners and academicians and at the same time to provide a ground on which the natural emulation among the interested law schools can harmoniously function; and to give the qualified specialists a sufficiently free hand in developing the policies of the Journal. Credit for this accomplishment is especially due to the generous interest of the institutions and individuals that participated in the informal conferences at which the plans for the Journal were devised: the first in New York on April 14, 1950, under the auspices of the Parker School of Foreign and Comparative Law of Columbia University, at which, after consideration, it was agreed to prepare plans for the Journal; the second at the Harvard Law School on April 16, 1951, at which the details were settled; and the third, the initial meeting of the editorial board at Ann Arbor on November 25–26, 1951, on the invitation of the University of Michigan Law School, at which the basic questions of editorial policy were discussed. The substantial support pledged by the sponsoring institutions, the active participation of numerous members of the bar, the genuine collaboration already established among the members of the editorial board, and the interested response of others, are an encouraging indication of the need for the Journal.

Apart from the organization of the Journal's activities, the central problem is of course the program. Of the numerous possibilities in the extensive area of comparative and foreign law, what can the Journal most usefully include within strictly limited space? The discussions among the members of the editorial board suggest that for a time the contents of the Journal will necessarily be somewhat experimental. On this account,

suggestions on how current needs will best be served will be particularly welcome. Meanwhile, as indeed this issue indicates, various decisions, even if in part tentative, have had to be made. While it is neither possible nor desirable to tie the hand of the board of editors on such matters, certain questions of policy respecting the coverage and general nature of the Journal are of interest. Incidentally, it may be noted that the present double issue for January and April, 1952, has inevitably been delayed by the necessities of making a variety of initial arrangements within a relatively brief period.

In the first place, the coverage of the Journal as respects subject matter has been in effect defined in the Agreement under which the Journal is published. As therein stated, the Journal "shall be devoted to materials relating to comparative, foreign, and private international law." It may therefore include, in addition to comparative legal materials as such, suitable studies of foreign legal developments, whether in legislation, judicial decisions, or legal literature, as well as studies concerning private international law. In this connection, five specific points may be noted. First, the editorial board is agreed that, in general, articles should be comparative in scope and primarily directed to readers in the United States. Second, although some question was initially raised respecting the desirability of including private international law, it is understood that *international* conflicts questions, as distinguished from interstate or analogous domestic conflicts of laws, are definitely to be included, as typically involving the application of foreign law and frequently comparison of laws. Third, although this is not expressly indicated in the Agreement, the developments in the field of jurisprudence or legal theory also fall within the range of the Journal. While this subject matter must needs be subordinated within the primary comparative objectives of the Journal, it is obviously germane, and, in the absence of a special organ for legal philosophy in the United States, the inclusion of this highly interesting phase of legal development is highly appropriate. Four, while the importance of legal documentation is fully appreciated, it is not contemplated, for the time being at least and among other things on the ground of printing costs, that the Journal should endeavor to provide the texts of significant foreign laws, projects, and the like, except as may be agreed in exceptional instances. Fifth and finally, to preclude misconception, it should be noted that the subject matter above defined comprehends both private and public law, excepting public international law which is well covered in the leading *American Journal of International Law*. In this field, while duplication is to be avoided, the private law aspects of matters that are also of interest from the viewpoint of public international law, lie within the

scope of this Journal. In other areas, the existence of more specialized publications will of course be taken into account.

The question of geographical coverage is more perplexing and is thus far in effect unresolved. In the early discussions, chiefly in order to elicit views on the possibility, the writer proposed that individual institutions should be encouraged to assume primary responsibility for following the developments in certain areas, such as the British Empire, Western Europe, Central Europe, Scandinavia, Russia and its satellites, Latin America, the Near East and the Far East, with such further allocations by country or by branch of law, as might be appropriate. For the time being at least, this proposal has been discarded, and the editorial board does not contemplate the inclusion in the Journal of systematic area reports, as for example appear in the *Zeitschrift für ausländisches und internationales Privatrecht*. Instead, as occasion suggests, it is planned to utilize leading articles or comments to report on significant developments within such areas. It may be anticipated that contributions of this nature in the Journal will be focused primarily upon the European scene and secondarily Latin America, but it is hoped that, as it becomes possible to enlist a staff of correspondents, it may also be feasible to include more complete *reportage* for other areas.

In the second place, leading contributions to the Journal, normally by recognized specialists, are to be selected and, when appropriate, specially invited, with the following objectives in view: First, to provide expert comparative exposition and analysis of the principal institutions of public and private law and in this way to improve the materials available for comparative legal instruction and, indeed, for understanding the practical problems that may arise in international practice. Second, to treat the legal aspects of problems arising in connection with the foreign commerce and other external activities of the United States. Third, as above noted, to survey trends in the laws of other countries that are of distinctive interest from a comparative or international standpoint. Fourth, to report and discuss pertinent developments in related disciplines, including legal education, legal philosophy, sociology of law, or legal history, as they may deserve comparative consideration.

In this connection, attention has been given to the possibility of devoting a certain proportion of the issues to "symposia" on particular topics. Although these would have the convenience of enabling the various aspects of the topics selected to be presented concurrently in single issues, the editorial board has postponed, and I believe wisely, plans for systematic scheduling of such symposia on account of the difficulties involved in their preparation and the probability that such concentration as respects

subject matter would unduly restrict the contents of the Journal. Instead, it is contemplated that, in appropriate instances, series of interrelated articles may be included in the Journal, appearing concurrently or consecutively as circumstances may suggest. This flexible solution allows symposia when desired, without the complications of a rigid schedule.

In addition, corresponding to the useful practice of the law reviews, the Journal includes a section of "Notes and Comments," brief articles which, it is conceived, may be especially valuable to furnish current information regarding notable legislative phenomena, recent leading cases, or other events of general interest, pertinent to the subject matter covered. In this section, expeditious reference also may be made to matters that, while of interest, do not deserve full-dress attention. In particular, suggestions respecting short contributions by members of the bar engaged in international practice, possible correspondents in other countries, and qualified foreign lawyers who may visit the United States, will be welcome. This last group deserves special consideration, since it will be highly advantageous to the Journal to recruit the interest and in specific cases the assistance of the numerous gifted graduate law students trained in the laws of other countries, who each year attend our universities.

The foregoing, as exemplified in the present issue, are supplemented by the "Survey of Foreign and Comparative Legal Literature," which, as is hoped and planned, is to constitute a central feature of the Journal. This is to include: reviews by qualified legal experts of important contemporary legal publications, which concern comparative law and related general legal subjects or which, although they deal specifically with some foreign legal system, have wider significance; briefer notices of other works that deserve attention; and a listing of current legal publications in these categories, which are received by, or drawn to the attention of, the Journal for purposes of review.

In addition to the above, the editorial board has considered the problems connected with the listing or digesting of the foreign periodical materials, access to which is indispensable for comparative purposes. In part on account of the difficulties and expense involved and in part since other organizations, including the American Association of Law Libraries, which issues the Index to Legal Periodicals, are more effectively organized to provide suitable guides to the foreign periodical literature and are sympathetically aware of the need, this important aspect of the survey of foreign legal literature has been held in abeyance in the hope that more appropriate arrangements can soon be made elsewhere. With the means now available, the Journal at most could be expected, and only in a modest

way, to publish special bibliographical aids covering foreign periodicals in areas where existing facilities are seriously defective. Thus, for the time being, a really comprehensive survey of the literature of comparative law, such as is now available for Roman and ancient law in the remarkable new annual publication, *Ivra*, of the Institutes of Roman Law of the Universities of Catania and Palermo, remains an aspiration, as indeed is also true with respect to the great mass of current legislative materials. Notoriously, this whole problem of indexing and documentation calls for attention, since the inadequacy of these necessary tools of comparative research fosters ignorance and wastes much time. But, however useful it might be, if funds were available, to provide for the printing of such reviews of reviews or even of documentation as part of the survey of comparative and foreign legal literature, they would have to be prepared independently, as these matters measurably transcend the scope of the Journal's activities, at least as hitherto contemplated. Apart from this consideration, the primary and most useful contribution that can be made in the Journal through the survey of literature is the selective evaluation of the more significant foreign legal publications.

Finally, reference should be made to two special features of the Journal: the "Bulletin" and the "Digest of Cases." The former, which is designed to provide information respecting events of comparative or international interest, including announcements and reports of the numerous conferences and congresses on topics relevant to the purposes of the Journal, in effect continues the annual *Bulletin* of the American Foreign Law Association and as such is also available to carry items concerning the activities of the Association. Also, although it has not been feasible to include the latter feature in the present issue, future issues are to contain a digest of judicial decisions of international or comparative interest supplementing the necessarily more selective consideration of case materials in articles and notes. The preparation of this useful department of the Journal is being generously undertaken by the American Foreign Law Association.

To summarize, it may be asked, How far does the Journal satisfy present needs as respects comparative legal studies in the United States? One way to answer this question is to compare the arrangements that have been made with the purposes that comparative legal science may serve.[9] Briefly stated, these are basically to provide more adequate and represen-

[9] For discussion and further references, see Yntema, "Roman Law as the Basis of Comparative Law" in 2 Law, A Century of Progress. 1835–1935. New York, 1937, 346, especially at 360 ff. For a recent discussion, see F. F. Stone, "The End to Be Served by Comparative Law" 25 Tulane Law Rev. (1951) 324.

tative knowledge concerning legal phenomena and, specifically, by making such comparative information available, to promote the following objects: First, to provide the necessary materials and techniques of legal science, which, as C. K. Allen has remarked, is essentially comparative.[10] Second, to refine the understanding of domestic law, which, conceived in terms of the prevalent nationalistic positivism, tends to be enshrouded in traditional, local preconceptions. Third, to make possible the understanding of foreign legal systems, which is of obvious practical importance in dealing with the legal aspects of foreign commerce and the conflicts that may therefrom arise, as well as to establish a basis of reciprocal international understanding. Fourth, to prepare international unification of law, where appropriate; there is abundant evidence that, for lack of adequate comparative study of the legal systems concerned and consequent failure to appreciate local needs, projects to secure international uniform laws typically prove abortive. Fifth, to assist in the determination of legislative policy through the study of foreign legislation; this, historically, has been the outstanding practical use of comparative law. And sixth, to define the ideals or values that should guide legal progress.

The Journal is but an instrument for such purposes, a co-operatively organized means to publish comparative legal materials. Measured by the yardstick suggested in the preceding paragraph, it is clear that there are certain things beyond its scope. First, it is not equipped to prepare the materials to be published; its success must therefore depend upon the active collaboration of individual scholars and lawyers and the support of the sponsoring and other interested institutions. In other words, without provision therefor, the Journal is not designed to carry the indispensable basic research needed to develop comparative legal studies in the United States; this is primarily the province of individual universities. Second, as may be inferred from the foregoing discussion, considerations of cost and space impose limitations upon the materials that can be reproduced in the Journal. There will have to be a premium upon concise

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[10] Allen, Legal Duties (1931) 12. In referring to supposed "kinds" of jurisprudence, Allen states:

"The cardinal error is to confuse the method with the essence and to consider any one kind as the only kind.

"For example, *comparative* jurisprudence. Its mode of operation is only an extension of the method of so-called 'particular' jurisprudence. Whether different systems of the same era are being compared, or individual institutions, or different periods of development in the same or different systems, the aim is to obtain data which lead inductively to juristic principles. The method of all sciences must be 'comparative' when the evidence upon which they depend is scattered over a wide area. In few, if any, of them is the largest known area of observation yet coincident with the actual area. The term 'comparative' clearly denotes only the method of operation, not the end in view, for the process of comparison is employed not for its own sake, but in order to arrive at general conclusions."

exposition, and certain types of matter, such as documentary texts, digests, reviews of reviews, and the like, will have to be severely restricted, unless funds for such purposes are made available. The same condition is a fortiori applicable to the important category of monographic and more elaborate comparative studies, which, while deserving special encouragement at the present time, are out of the Journal's bounds. Incidentally, in view of these limitations, the Journal should prove to be a stimulus rather than an obstacle to increased attention to comparative topics in the existing law reviews and to more specialized comparative legal publications elsewhere in the United States. There is plenty of room.

Assuming interested cooperation, however, the Journal is in position, I believe, to contribute significantly to the objectives enumerated above. In its pages, there will be room to explore the basic questions of legal science in comparative light. Here, the fundamental institutions of private and public law, as exemplified in different legal systems, can be analyzed and compared in a manner that will enrich understanding of domestic as well as foreign law; such essays are especially valuable for the purposes of legal education. Here too, appropriate attention—and criticism—utilizing comparative materials, can be given to projects of legislative reform, national or international, and to judicial decisions of comparative interest. In addition, the Journal will assist the busy lawyer and law teacher to keep abreast of the more significant events and developments that are of professional or scientific interest from a comparative viewpoint and, through the survey of legal literature, to follow selectively the more important publications in the field.

Beyond these specific potentialities, the arrangements made in connection with the Journal provide an effective means of inter-institutional and individual co-operation. Comparative law is a field too vast to be preempted by a single institution, and, even if this were possible, such concentration would be undesirable in the broad expanses of the United States. To avoid thin dispersion of effort, it is necessary to specialize and to co-ordinate. The Journal provides a forum to exchange information and to correlate the activities of the institutions concerned, while the American Foreign Law Association has been enlarged to enlist the effective participation of lawyers and individual legal scholars. These arrangements, providing a basis to integrate existing activities and interests, are also calculated to stimulate additional needed developments, as the desirability of comparative legal information, and the limitations of existing materials, are more generally appreciated. Through the Journal, the responsibility—and the credit—is focused in the institutions to which we must look for an adequate renascence of comparative legal science in the United States today.

MYRES S. McDOUGAL

The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order

> "... Every true science employs a method of which the technical and professional schools make little use. This method is comparison. It is preeminently *the* scientific method; without the employment of the comparative method, no body of knowledge regarding the facts of social life can take rank as a science."
> Munroe Smith, A General View of European Legal History and Other Papers (1927) 263.
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> "The method of natural science rests always on the comparison of observed phenomena, and the aim of such comparison is by a careful examination of diversities to discover underlying uniformities. Applied to human societies the comparative method used as an instrument for inductive inference will enable us to discover the universal, essential, characters which belong to all human societies, past, present, and future. The progressive achievement of knowledge of this kind must be the aim of all who believe that a veritable science of human society is possible and desirable."
> A. R. Radcliffe-Brown in Preface to Fortes and Evans-Pritchard, African Political Systems (1940) xi.

IN A WORLD SHRINKING AT AN ever-accelerating rate because of a relentlessly expanding, uniformity-imposing technology, both opportunity and need for the comparative study of law are unprecedented. In this contemporary world, people are increasingly demanding common values that transcend the boundaries of nation-states; they are increasingly interdependent in fact, irrespective of nation-state boundaries, for controlling the conditions which affect the securing of their values; and they are becoming ever more realistic in their consciousness of such interdependences, and hence widening their identifications to include in their demands more and more of their fellow men.[1] These changing perspectives of peoples the world over stimulate in turn ever intensifying demands for wider and wider political co-operation, for the more and more effective use of conjoined community power, for securing newly clarified and es-

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[1] Wright (Ed.) The World Community (1948); Lasswell, The World Revolution of our Time (1951) and The Interrelations of World Organization and Society, 55 Yale L. J. (1946) 889, reprinted as Ch. VI of Lerner and Lasswell (Ed.), The Policy Sciences (1951); Ogburn (Ed.), Technology and International Relations (1949); Weigert, Stefansson, and Harrison (Eds.), New Compass of the World (1949); Linton (Ed.) Most of the World (1949).

tablished goals. A general purpose world organization, a host of ancillary and subsidiary organizations and agencies, a great range of regional pacts and understandings and of functional unifications, and multiplied thousands of multilateral and bilateral agreements all bear witness, and the beginning only is here.[2] The values for which this co-operation is demanded embrace the whole of our present-day democratic preferences for a peaceful world. Such values include not only security, in the sense of full opportunity, free from violence and threats of violence, to pursue all values by peaceful, non-coercive procedures, but also all the other value-variables upon which such security depends:[3]

the wide sharing of *power*, both formal and effective, including participation in the processes of government and of parties and pressure groups, and equality before the law;

freedom of inquiry and opinion and for communication of the *enlightenment* by which rational decisions can be made;

the access to resources and technology necessary to the production of

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[2] Sohn, Cases and Materials on World Law (1950); De Russet, Strengthening the Framework of Peace (1950); Levi, Fundamentals of World Organization (1950); Holborn, The Political Collapse of Europe (1951); Bebr, Regional Organizations: Their Functions and Potentialities in the World Community (J. S. D. Thesis, Yale Law School, 1951).

[3] The itemization that follows is one designed to permit, by the use of appropriate operational indices, the most detailed comparative description of varying legal doctrines and practices, and will be employed in later sections of this article. The reference to "value-variables" is intended to emphasize that each value may in varying contexts be both a value that is demanded and a base of power for affecting the distribution of values. For more detailed statement of the type of analysis proposed, see Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. (1943) 203; Lasswell and Kaplan, Power and Society (1950); McDougal and Leighton, "The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action," 59 Yale L. J. (1949) 60; Lerner and Lasswell (ed)., The Policy Sciences (1951).

We emphasize "policy purposes" because we regard a jurisprudence which purports to be "scientific" only as inadequate. As important as it is for an observer not to permit his preferences to distort his vision of the events being observed, a creative jurisprudence requires not only the ways of thinking and procedures of observation commonly called scientific but also a number of other integrated and interrelated methods of thought and observation. Such other methods include the clarification of goal values, the description of historical and contemporary trends in the realization of values, the critical projection of trends into the future on the basis of historical and scientific knowledge, and the invention and evaluation of alternatives of policy by which fundamental goal values can be most fully attained. The use of scientific procedures alone may, as many studies have demonstrated, be utterly haphazard and sterile. The other modes of thinking and observation are required to guide the use of scientific procedures to important problems, to determine the degree of quantification or mathematization necessary in any particular investigation, and to process any knowledge acquired for use by decision-makers. Effective inquiry into law requires emphasis upon both policy and science—in sum, a disciplined use of all relevant modes of thinking and observation.

goods and services for maintenance of rising standards of living and comfort;

the fundamental *respect* for human dignity which both precludes discrimination based on race, sex, color, religion, political opinion, or other ground irrelevant to capacity, and provides a positive recognition of common merit as a human being and special merit as an individual;

health and *well-being* and inviolability of the person, with freedom from cruel and inhuman punishments and positive opportunity for the development of talents and enrichment of personality;

opportunity for the acquisition of the *skills* necessary to express talent and to achieve individual and community values to the fullest;

opportunity for *affection*, fraternity, and congenial personal relationships in groups freely chosen;

and finally, freedom to justify common standards of responsibility and *rectitude*, to explain life, the universe, and values, and to worship God or gods as may seem best.

It needs no new emphasis today that our contemporary demands for co-operation that transcends nation-state boundaries in the shaping and sharing of values occur in the context of a world power process.[4] In this process the policies that determine the degree to which we can achieve our values are formulated by many participants—conveniently categorized as nation-states, international governmental organizations, political parties, pressure groups, private associations, and individual human beings—in multitudinous interactions, the ramifications and effects of which are global in their reach. The practices by which any one participant engages in this process, the bases of its power, and the area, scope, and weight of influence it achieves are obviously directly affected by the practices, bases of power, and effects achieved by each of the other participants.[5] Thus, how a nation-state controls its people and resources and organizes its institutions as bases of power, how it structures and operates its foreign affairs procedures for peace and war, and how it regulates and controls or supports and exports political parties, pressure groups, and private associations, may vitally affect not only the general practices of other nation-states and their willingness or unwillingness to engage in particular measures of co-operation but also the amount of power that can be conferred upon international governmental organizations and the trans-national roles that can be permitted to parties, pressure groups, pri-

[4] Schwarzenberger, Power Politics (2d. Rev. Ed. 1951); Spykman, The Geography of the Peace (1944).

[5] For the development see McDougal, "The Role of Law in World Politics," 20 Miss. L. J. (1949) 253 and "Law and Power," 46 Am. J. I. L. (1952) 102.

vate associations, and individual human beings. It is, therefore, an opportunity of overwhelming urgency for the comparative study of law to explore the power processes of the nation-states of the world and to clarify the variables, both predispositional and environmental, which move different decision-makers in different nation-states. The urgency of this opportunity is no less whether one's expectations are of future peace or of imminent world-wide violence or whether one envisages the whole globe as the area of co-operation or only certain accessible portions of the globe.[6] The need is for that understanding of the power processes of ourselves and others which can give us both realistic orientation in the world power process as a whole and the special insight required for effective co-operation in the promotion of each of our basic democratic values, whatever the exigencies of future violence and whatever the area in which we can work.[7]

It may be questioned, however, whether our traditional conceptions and techniques of comparative study are adequate to meet such contemporary need. Despite many exhortations over a period of years,[8] contributions important to understanding and co-operation are relatively few, and little important work is presently being done in our law schools or

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[6] In Griffith (Ed.), Research in Political Science (1948) 17, Loewenstein, Stoke, and Cole write on the "Role of Comparative Government":

"In this period of total war, which has added to belligerency of a military, economic, and diplomatic character political warfare as a way to victory, the knowledge of foreign political institutions and ideologies has become of paramount importance. Cooperative government has been transformed from a Cinderella-like academic discipline into a political instrumentality of the most immediate potency. It is obvious that without intimate knowledge of their political institutions and attitudes we could not hope to understand what makes our enemies strong, or to pierce their psychological armor; nor would we be able to assist them after the war in reintegration into the world community, in case this should be our task."

[7] *Cf.* Yntema, "Comparative Research and Unification of Law," 41 Mich. L. Rev. (1943) 261, "Research in Inter-American Law at the University of Michigan," 43 Mich. L. Rev. (1944) 549, and Review, 54 Yale L. J. (1945) 889; Hazard, "Comparative Law in Legal Education," 18 U. Chi. L. Rev. (1951) 264; F. Stone, "The End to be Served by Comparative Law," 25 Tulane L. Rev. (1951) 325; Rabel, 1 The Conflict of Laws: A Comparative Study (1945) xii; David, Traité Élémentaire de Droit Civil Comparé (1950) 1–214; Czyzak, Review, 1950 Wash. U. L. Q. 548; Kuhn, "The Function of the Comparative Method in Legal History and Philosophy," 13 Tulane L. Rev. (1939) 350.

[8] One of the most useful articles still is Le Paulle, "The Function of Comparative Law," 35 Harv. L. Rev. (1922) 838. M. Le Paulle urged:

"But in a period like the present, when many social organisms and functions are growing very rapidly, often in unforeseeable ways, when the law, in many points, is already far behind the times, when there is a rising discontent with the inadequacy of the law to meet the new conditions, it seems that the first duty of any law school, either toward the science of law at large, or toward its own country, is to train the new generation in such a way as to enable it to meet the entirely new situations created by the new and profound changes in modern society."

elsewhere.[9] Almost any sampling of current literature and comment reveals sharp discontent with the effects being achieved.[10] In typical summary Dean Wigmore some twenty years ago characterized the "literature of comparative law" as being "marked frequently by the barren dissection of verbal texts"[11] and most recently an editor of this review, in singling out one book for especial praise, offers contrast with "the glib, overly general and painfully superficial treatments which have so often passed current as comparative law."[12]

The causes of the failure of comparative study to rise to contemporary need are of course various. Some observers have stressed lingering isolationism[13] and narrow, ill-conceived vocationalism.[14] Most fundamental, however, would appear to be the general failure of legal scholarship to invent and employ a method adequate to the task of realistically describing and effectively appraising a flow of authoritative decisions through time, that is, for making fruitful comparisons through time, whether the comparisons are confined to decisions within the boundaries of single nation-states or extend across such boundaries.[15] The greatest confusion

[9] Note the relative paucity of studies cited in Schlesinger, Comparative Law Cases and Materials (1950) 144.

It is not intended by this over-all negative appraisal to underestimate the importance of certain specific contributions, such as those of Professor Rabel in private international law or of Professor Hazard in Russian law. Such oases serve, however, only to make more conspicuous the desert.

[10] Thus Stone, *supra*, note 7, 334, writes:

"Perhaps at no time in history have we had so many conferences, so many books and exchanges and so little clear knowledge of the end which they serve."

For a sampling of reviews highly critical of present methods and results, see Riesenfeld, 3 J. Legal Ed. (1951) 620; Fulda, 36 Corn. L. Q. (1950) 185; F. Stone, 26 N. Y. U. L. Q. Rev. (1951) 239; Timasheff, 26 N. Y. U. L. Q. Rev. (1951) 393; and Rashba, "Consecrated Ignorance of Foreign Law?," 39 Calif. L. Rev. (1951) 355.

[11] Wigmore, "More Jottings on Comparative Legal Ideas and Institutions," 6 Tulane L. Rev. (1932) 244, 263.

[12] Von Mehren, Review, 65 Harv. L. Rev. (1952) 532, 534. The book praised is Dawson, Unjust Enrichment: A Comparative Analysis (1951).

[13] Macmillan, Review, 63 Law Q. Rev. (1947) 227, 228 writes: "Isolationism may well find its last refuge in the tenacity with which each nation clings to its own legal system."

[14] F. Stone, Review, 26 N. Y. U. L. Q. Rev. (1951) 239.

In "Research in Inter-American Law at the University of Michigan," 43 Mich. L. Rev. (1944) 549, 550, Yntema writes:

"Thus, until but recently, historical attachment to the Common Law as a bond of Anglo-Saxon unity, acceptance of the formal, authoritarian notion of law developed by Austin as the instrument of utilitarian reform, and the approach to government as a branch of social science, the last outside the pale of law proper, incongruously joined to form a basic philosophy of law in the United States, that while it persisted, doomed legal science to exegetic impotence."

[15] Yntema has made the point most cogently that fruitful historical study of decision-making processes within a single nation-state requires perfection and application of comparative methods. See "Roman Law as the Basis of Comparative Law," 2 Law: A Century of Prog-

continues to prevail about what is being compared, about the purposes of comparison, and about appropriate techniques. The "law" that is being studied is still too often regarded as a body of doctrine or rules, divorced from power and social processes. Studies are still organized, and comparisons attempted, in terms of technical doctrines of highest level ambiguity, doctrines which purport to perform in one and the same reference the very different functions of describing past decisions, of prescribing what future decisions should be, and of predicting such decisions. The conception of law as a decision-making process, and a process in which the decision-makers are influenced by many variables, has had as yet but few effects. Conceptions of scientific method for study of the variables, including technical doctrines, that affect decision are most inadequate. Precise study of trends in decision and conditioning factors is almost nonexistent. Little effective effort is made to relate decisions to basic community values or, when discrepancies are observed, to clarify values and adopt a creative attitude in the invention and adaptation of new means. The consequence is a literature that is voluminous, obsessively repetitious, and sterile—a literature that feeds and grows, like a psychic cancer, upon logical classification and reclassification and technical refinement and sub-refinement, without limit and with a minimum of external reference and relevance.[16]

Remedy for the failure of comparative study must naturally begin with removal of its causes. Any program for the comparative study of law which would be fruitful must, therefore, apparently include among its intellectual tools three indispensable prerequisites: first, a clear and realistic notion of what is being compared; second, an understanding of and interest in the purposes of the comparison sufficient to guide and sustain it; and, finally, techniques of comparison adequate to yield knowledge

ress (1937) 346 and "Research in Inter-American Law at the University of Michigan," 43 Mich. L. Rev. (1944) 549. Cf. Pollock, "The History of Comparative Jurisprudence," 5 J. Comp. Leg. (N. S.) (1903) 74; Malinowski, A Scientific Theory of Culture and Other Essays (1944).

[16] Hug and Ireland in "The Progress of Comparative Law," 6 Tulane L. Rev. (1931) 68, 73, excoriate common procedures:

"To take some rule or accepted formula covering a definite point of doctrine in one system of law, find a similar expression in one or more other systems, and write a note or longer comment which could in effect be boiled down to a quotation of the various provisions more or less adequately translated into the author's language with references (as to the variously numbered sections of the respective national codes) sufficient to enable the original versions to be found, neither involves important mental processes by the writer nor excites contributory stimulation in the reader. A numerically selective robot could produce as fruitful results from a good shelf of statutory compilations. It may be remarked in passing that the character, as secondary source material, of any discussion of one or more problems in the system of law of a single jurisdiction or of the whole system itself (however exotic and remote ethnically or geographically) or of a single homogeneous group (as "the civil law"), is not altered by its being presented in a language or place not its own; and such a presentation does not by itself fall within our definition of comparative law."

relevant to and sufficiently precise for the purposes established.[17] It is to each of these prerequisites that we propose to direct a few preliminary and tentative observations.[18]

It is fortunately becoming increasingly recognized today that what must be compared, if comparisons are to be relevant and useful, is not doctrine merely but doctrine and practice, not a flow of rules merely, but a flow of *decisions*.[19] Comparison cannot relevantly and usefully be confined to rules alone both because rules are not the only variables that affect decision and because, as embodiments of policy crystallizations of the past, they may not offer adequate description of the effects of new decisions.[20] The process of decision-making is indeed, it is now common

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[17] Schmitthoff, "The Science of Comparative Law," 7 Cambridge L. J. (1939) 95 makes comparable demands and offers the beginnings of clarity in establishing an adequate theoretical structure.

[18] Throughout this article the writer draws heavily upon collaborative studies with Professor Harold Lasswell in seminars on *Law, Science, and Policy* and *World Community and Law*.

[19] For inspiring application of this insight see Llewellyn and Hoebel, "The Cheyenne Way" (1941).

In "The Progress of Comparative Law," 6 Tulane L. Rev. (1931) 68, 73, Hug and Ireland make eloquent statement:

"To understand the history of the rule, to trace its principal sources, its developing vicissitudes, and its final formation and acceptance, to appreciate its relation to other parts of the instant system, and, most important of all, to learn its actual operation, to see what it does as distinct from what it says, by consultation of the commentators and more importantly by examination of the actual decisions of the courts to carry through this analysis for each of the great systems of law, classifying and discussing as many of the subdivisions as circumstances permit, to discover and set forth the similarities and differences of the existing solutions, and then to make a summation of the whole resultant with a view to an at least partial and temporarily valid prediction as to the tendency of current doctrine and lines of decision, more correctly constitutes the real purpose of comparative law."

In "Research in Inter-American Law at the University of Michigan," 43 Mich. L. Rev. (1944) 549, 557, Yntema insists:

"Mere formal collocation of the laws to be compared is not adequate; account must be taken of the interpretative doctrines and their illuminating applications by the courts to specific problems, as well as of the differing structures of ideas, the historical background, and the special procedural and practical aspects, relating to each question. The problem is to examine not mere formulations *in abstracto* but functioning legal institutions, as they appear each in its more or less specific social context."

[20] Kahn-Freund makes concise summary in his Introduction to Renner, The Institutions of Private Law and Their Social Function (Kahn-Freund ed. 1949):

"Positivism is a utopia. The law is neither consistent nor self-sufficient. Whatever theorists may say and whatever he himself may think and say, the judge constantly recurs to an analysis, articulate or inarticulate, of the moral, social, and economic function and effect of the rules and principles he applies and of his own decision."

Contrast Sereni, on "Teaching Comparative Law," 64 Harv. L. Rev. (1951) 770, 776, who suggests that "a law course should study the law from within and in itself rather than in relation to other standards of human conduct." He adds:

"Although the study of law as a social institution is an important topic, it belongs to the realm of social science, rather than to the curriculum of a law school, inasmuch as such a study deals with the law as an aspect of social behavior."

knowledge, one of continual redefinition of doctrine in the formation and application of policy to ever-changing facts in ever-changing contexts.[21] The variables to which decision-makers respond, the factors which affect decision, are both environmental and predispositional. Environmental variables include the facts of a particular controversy, the competing claims of the parties, and the standards invoked (comprising both technical legal doctrines in terms of rights, duties, powers, property, title, contract, tort, sovereignty, due process, and so on, and policy propositions in terms of basic community values), as well as the whole community context.[22] Predispositional variables include the attitudes (demands for values, identifications, and expectations), skills, class positions, and character structures of decision-makers.[23] It is, therefore, obvious that different decision-makers responding to different variables may in cases which a disinterested observer would regard as comparable use the same technical doctrines to reach different results or different technical doctrines to reach the same results.[24] Hence, comparison even of technical doctrines can be made meaningful only when such doctrines are located in the re-

[21] Judge Jerome Frank in Courts on Trial (1949) Ch. X, "Are Judges Human," offers an informal account of the factors that may affect decision. See also Cardozo, The Nature of the Judicial Process (1921); Green, Judge and Jury (1930); Cohen and Cohen, Readings in Jurisprudence and Legal Philosophy (1951) Ch. 6; Von Mehren, Review, 63 Harv. L. Rev. (1949) 370 (referring to continental judges); Douglas, "Stare Decisis," 49 Col. L. Rev. (1949) 735; Frankfurter, "Some Reflections on the Reading of Statutes," 47 Col. L. Rev. (1947) 527.

[22] For elaboration see McDougal, "Future Interests Restated: Tradition Versus Clarification and Reform," 55 Harv. L. Rev. (1942) 1077; Lasswell and McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest," 52 Yale L. J. (1943) 203.

[23] The relevance of such variables is outlined in detail by Lasswell in Power and Personality (1948).

Mead in Ch. IV, "The Study of National Character," in Lerner and Lasswell, The Policy Sciences (1951), describes the present state of comparative research.

[24] Demand for a "functional approach" to comparative study has been made many times. Thus, Rheinstein in a classic and highly influential article on "Teaching Comparative Law," 5 U. Chi. L. Rev. (1938) 615, 617 wrote:

"The statement that law is a means of social control and organization has almost become a commonplace. Not all the implications of this proposition have been fully realized, however. For legal science, it implies the task of inquiring into the social function of every legal rule and institution."

More recently in Report of Institute in the Teaching of International and Comparative Law, American Association of Law Schools (1948) 83, 111, Rabel succinctly states:

"Every comparison, of course, needs a common denominator, a *tertium comparationis*. For me in these fifty years past, this has always been the social purpose of the rules and the service of the concepts to this purpose. This is now aptly called the functional approach."

The demand for inquiring into functions is, however, but the beginning of insight. Further questions are "functional" for whom, against whom, with respect to what values, determined by what decision-makers, under what conditions, how, with what effects. Comprehensive guiding theory must take all these questions into account.

spective decision-making processes in which they are being used and observations are made of the equivalences and non-equivalences in effects which different decision-makers responding to different variables achieve by the use of such doctrines.[25] Comparison which extends beyond the traditional fixation upon technical doctrine to the comprehensive and systematic investigation of the other important variables that affect decision must clearly require the study and exposure of decision-making processes in their entirety.[26]

It may perhaps bear emphasis that the decisions requiring study are not merely governmental decisions, that is, decisions by officials who have formal authority and are expected by community myth to make important community decisions. Formal authority and effective control may or may not be conjoined in the same decision-makers in any given community.[27] Effective control over decision may in varying degree be located in governmental institutions, but it may also in degree equally varying be located in political parties or pressure groups or private associations. The individuals who in fact make the decisions may rely for their power not upon formal authority but upon wealth, enlightenment, respect, or other values.[28] The degree to which the technical legal doctrines of a community

[25] Le Paulle makes the point forcefully:

"First, it must be clear that a comparison restricted to *one* legal phenomenon in two countries is unscientific and misleading. A legal system is a unity, the whole of which expresses itself in each part; the same blood runs in the whole organism. Hence each part must necessarily be seen in its relation to the whole. An identical provision of the law of two countries may have wholly different moral backgrounds, may have been brought about by the interplay of wholly different forces, and hence the similarity may be due to purest coincidence—no more significant than the double meaning of a pun."

"The Function of Comparative Law," 35 Harv. L. Rev. (1922) 838, 853. So also Dean Pound in "Philosophy of Law and Comparative Law," 100 U. Pa. L. Rev. (1951) 1:

"But a fruitful comparative law must involve more than comparison of legal precepts, important as that is. There should be comparison of systems of law as systems, not merely precept by precept."

Cf. Schmitthoff, "The Science of Comparative Law," 7 Cambridge L. J. (1939) 95, 97.

The big question is, however, how an organization of studies can be perfected which will permit either the comparison of systems or the making of partial comparisons which can contribute to comprehensive understanding.

[26] Margaret Mead generalizes:

"The science of culture can insist, therefore, that when we consider contrasting types of behavior we shall attend always to the complete system, and that random, indiscriminate citations of cultural contrasts in detail be strictly recognized for what they are, iconoclastic polemic material, ammunition for agitators, but with no scientific validity."

"The Comparative Study of Culture and The Purposive Cultivation of Democratic Values" in Conference on Science, Philosophy and Religion (1942) 56, 58.

[27] For development of these distinctions in detail see Lasswell and Kaplan, Power and Society (1950) Chs. V and VIII; McDougal, "Law and Power," 46 Am. J. I. L. (1952) 102.

[28] Malinowski in his Introduction to Hogbin, Law and Order in Polynesia (1937) xxxi,

represent reality or illusion may in great measure depend upon the exact interrelations of formal authority and effective control.[29] Thus, a constitutional prescription of doctrines for the maintenance of civil liberties and an attempted balancing of power between legislative, executive, and judicial institutions may succeed in a community where effective control is widely dispersed but fail in a community where legislative, executive, and judicial institutions remain subject to a concentrated effective control that is hostile to civil liberties.[30] Hence, comparative study of the realities of practice as well as myth must take into account not only the structures and processes of formal authority but also those of effective power, and of their interrelations.

The purposes that may move different observers to the comparative study of decision-making processes are of course many and varied.[31]

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urges students "never to forget the living, palpitating flesh and blood organism of man which remains somewhere at the heart of every institution."

Similarly Radcliffe-Brown in his Preface to Fortes and Evans-Pritchard, African Political Systems (1940) xxiii, offers in a description of the "state" insights too often forgotten:

"In writings on political institutions there is a good deal of discussion about the nature and the origin of the State, which is usually represented as being an entity over and above the human individuals who make up a society, having as one of its attributes something called 'sovereignty', and sometimes spoken of as having a will (law being often defined as the will of the State) or as issuing commands. The State, in this sense, does not exist in the phenomenal world; it is a fiction of the philosophers. What does exist is an organization, i.e. a collection of individual human beings connected by a complex system of relations. Within that organization different individuals have different roles, and some are in possession of special power or authority, as chiefs or elders capable of giving commands which will be obeyed, as legislators or judges, and so on. There is no such thing as the power of the State; there are only, in reality, powers of individuals—kings, prime ministers, magistrates, policemen, party bosses, and voters. The political organization of a society is that aspect of the total organization which is concerned with the control and regulation of the use of physical force. This, it is suggested, provides for an objective study of human societies by the methods of natural science, the most satisfactory definition of the special class of social phenomena to the investigation of which this book is a contribution."

[29] *Cf.* F. Stone:

"We must study the history, the politics, the economics, the cultural background in literature and the arts, the religious beliefs and practices, the philosophies, if we are to reach sound conclusions as to what is and what is not common."

"End to be Served by Comparative Law," 25 Tulane L. Rev. (1951) 325, 332. See also Gutteridge, Comparative Law (2d ed. 1949) 174.

[30] An illustration borrowed from a lecture by Professor Franz Neumann.

[31] The literature upon the purposes of comparative study is voluminous. In addition to the articles already cited, the following items are among the many that deserve attention: Gutteridge, Comparative Law (2d ed. 1949) ch. 1; David, Traité Élémentaire de Droit Civil Comparé (1950) 1–214; Wigmore, 3 A Panorama of the World's Legal Systems (1928) 1119; Schlesinger, Comparative Law Cases and Materials (1950) 8; Bryce, 2 Studies in History and Jurisprudence (1901) 607, 619; Pollock, "The History of Comparative Jurisprudence," 5 J. Comp. Leg. (N.S.) (1903) 74; Vinogradoff, 2 Collected Papers (1928) (various essays on jurisprudence); Hohfeld, Fundamental Legal Conceptions (Cook ed. 1923) 340; Ehrlich, "Comparative Public Law and the Fundamentals of Its Study," 21 Col. L. Rev. (1921)

Relatively recent surveys include such itemizations as "the general purpose of any science: the search for truth", increase in the understanding of the legal rules and institutions of one's own country, increase in the understanding of foreign laws and of assistance to practitioners, the unification of laws, increase in the understanding of international law, improvement of legislative policy and definite legislative purposes, "developing understanding of the role of law as a social institution", decreasing the exercise of arbitrary power and increasing the rule of law, and "the instilling of values".[32] It is believed, however, that there is today, for scholars who demand and share responsibility for the values of a free society, one central purpose which can unify and revivify all these other purposes. Most broadly conceived, that central, over-riding purpose is, in accord with the opportunity and need we have urged above, the clarification for all our communities—from local through national and regional to global—of the perspectives, the conditions, and the alternatives that are today necessary for securing, maintaining, and enhancing basic democratic values in a peaceful world.[33]

The potentialities of the comparative method for value clarification at different community levels have just begun to be demonstrated.[34] Enough creative comparative studies have been made, however, to suggest that the method can be used to clarify the values of the peoples of the world, not for simple verbal unification or for promoting any particular world organization, but rather for demonstrating the deep underlying equivalences in their demands for the values of a free society, for reinforcing their

623; Hazeltine, "The Study of Comparative Legal History," 1927 J.S.P.T.L. 27; Escarra, "The Aims of Comparative Law," 7 Temple L.Q. (1932) 296; Lambert, "Comparative Law," 4 Encyc. Soc. Sci. (1937) 126; Cohn, "The Task and Organization of Comparative Jurisprudence," 51 Juridical Review (1939) 134; Friedmann, "A Comparative Law Course at Melbourne University," 1 J. Soc. Pub. T. L. (N.S. 1949) 274; Lawson, "The Field of Comparative Law," 61 Juridical Review (1949) 16; Auld, "Methods of Comparative Jurisprudence," 8 U. Tor. L. J. (1949) 83; Hazard, "UNESCO and the Law," 4 Record (1949) 291; Dainow, "Teaching Methods for Comparative Law," 3 J. of Legal Ed. (1951) 388.

[32] These itemizations are taken by random sampling from Rheinstein, "Teaching Comparative Law," 5 U. Chi. L. Rev. (1938) 615; Hazard, "Comparative Law in Legal Education," 18 U. Chi. L. Rev. (1951) 264; Stevenson, "Comparative and Foreign Law in American Law Schools," 50 Col. L. Rev. (1950) 614; Yntema, "Roman Law as the Basis of Comparative Law," 2 Law: A Century of Progress (1937) 346; and F. Stone, "The End to be Served by Comparative Law," 25 Tulane L. Rev. (1951) 325.

[33] *Cf.* Riesenfeld, Review, 3 J. Legal Ed. (1951) 620; Sayre, Review, 36 Iowa L. Rev. (1951) 585; Sturges, "The Quest for World Law and Order," 22 Tulane L. Rev. (1948) 558; Hazard, *supra*, note 32; and Leighton, Human Relations in a Changing World (1949) 101.

[34] The most significant and dramatic demonstration has been in the United Nations Human Rights program. For introduction, see Lauterpacht, International Law and Human Rights (1950); Robertson, "The European Convention for the Protection of Human Rights," 27 B.Y.B.I.L. (1950) 145.

expectations that they can best maximize their own individual values in such society, for cementing their loyalties to such society, for increasing the identifications of all free peoples with each other, and for in general establishing the consensus and predispositions necessary to effective co-operation in whatever forms of organization may be most appropriate under contemporary conditions.[35] It has already been sufficiently urged that the method is indispensable to understanding of the world power process and the various component processes that condition every measure, external or internal, co-operative or unilateral, in every community. Certainly no other method promises more in the invention and adaptation of felicitous alternatives, doctrines and procedures, for the achievement of our emerging goals, whether world, regional, national, or local.[36]

For achieving its central and other important purposes, it will be essential for comparative study to discover and apply both a comprehensive guiding theory and the techniques adequate to describing comparable decisions through time and across political boundaries. The comprehensive guiding theory that is necessary must permit, and require, an investigator to categorize the facts to which decision-makers respond in terms of value changes (as contrasted with doctrinal technicalities) which

[35] The theme is developed in McDougal and Leighton, "The Rights of Man in the World Community: Constitutional Illusions versus Rational Action," 59 Yale, L.J. (1949) 60, 108.

The possibilities of discovering deep underlying equivalences in values, despite differences in institutional doctrines and practices, are emphasized by many observers. See, for examples, Murdock, "The Common Denominator of Cultures" in Linton (ed.) The Science of Man in the World Crisis (1945) 123 and Leighton, Human Relations in a Changing World (1949). The latter writes:

"Related to the lack of a functional view of human affairs is a difficulty in seeing common qualities and common dynamic patterns when they appear in widely different contexts, or in strikingly different shapes. If one does not think in functional terms, it necessarily follows that he will not perceive how functions exist like recurrent themes in an enormous variety of different situations. Non-scientific thinking tends to generalize on the basis of gross similarities and differences of structure, not on similarities and differences of dynamic process." (161).

"It seems impossible that a jelly-fish and a man can have the same ground plan, so great is their difference in appearance; yet they share metabolism, growth, reproduction, respiration, irritability, and much else." (162).

For expressions of the possible range of legal equivalences see Rheinstein, Review, 64 Harv. L. Rev. (1951) 1387; Neumann, Review, 64 Pol. Sci. Q. (1949) 127 (indicating a certain lack of originality in Soviet law); Kahn-Freund, Introduction to Renner, The Institutions of Private Law and Their Social Function (Kahn-Freund ed. 1949); Jackson, "Some Problems in Developing an International Legal System," 22 Temple L.Q. (1948) 147; Eder, A Comparative Survey of Anglo-American and Latin-American Law (1950) 4; and Friedmann, "A Re-Examination of the Relations between English, American, and Continental Jurisprudence," 20 Can. Bar. Rev. (1942) 175.

[36] Hug, "The History of Comparative Law, 45 Harv. L. Rev. (1931) 1027 offers some indication of the tremendous diffusion of legal techniques in various epochs. A helpful recent contribution is Lenhoff, "America's Legal Inventions Adopted in other Countries," 1 Buffalo L. Rev. (1951) 118.

transcend the peculiarities of national or regional institutional practice; to take into account all the important variables that affect decision and to clarify the doctrinal variables, and the predispositions that decision-makers bring to decision, in terms of the basic individual and community values sought; to make precise description of the trend of decisions through time and to appraise the impact of different technical doctrines among other variables in conditioning different decisions; to identify in detail the community values in fact at stake in a flow of decisions and to assess the compatibility of alternative decisions with the values so clarified; and, finally, creatively to explore the whole range of alternatives, in both doctrine and institution, that may be adopted or invented for maximizing decisions in accordance with community values under the given conditions.[37] Specific techniques in the application of this guiding theory must, drawing upon all the insights and skills of contemporary scientific study of culture[38] and personality,[39] be adequate for performance of all the indicated tasks.

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[37] These are the indispensable procedures in a "policy oriented" approach to any legal study. Lasswell and McDougal, Syllabus, Law, Science, and Policy (1950).

[38] Lerner and Lasswell (Ed.), The Policy Sciences (1951) offer survey and bibliography of recent studies. See also Lasswell, Lerner, and Rothwell, The Comparative Study of Elites (1952); Lasswell, Lerner, and Pool, The Comparative Study of Symbols (1952); and Lasswell, Leites, and Associates, Language of Politics (1951).

The rich insights of Malinowski remain largely unused by legal scholars. See Malinowski, A Scientific Theory of Culture and other Essays (1944); The Dynamics of Cultural Change (1945); Introduction to Hogbin, Law and Order in Polynesia (1937); "A New Instrument for the Interpretation of Law—Especially Primitive," 51 Yale L.J. (1942) 1237; 1 Coral Gardens and Their Magic (1935) Ch. XI; Crime and Custom in Savage Society (1926). Other recent books rich in suggestion are Murdock, Social Structure (1949); Kluckhohn, Mirror for Man (1949); Merton, Social Theory and Social Structure (1949); and Kroeber, Social Theory and Social Structure (1944).

Significant studies more directly related to power processes are UNESCO, Contemporary Political Science: A Survey of Methods, Research and Teaching (1950); Timasheff, An Introduction to the Sociology of Law (1939); Rusche and Kirchheimer, Punishment and Social Growth (1939); MacIver, The Web of Government (1947); Merriam, Systematic Politics (1945); Mosca, The Ruling Class (Livingston Ed. 1939).

Widely heralded recent books such as Parsons and Shils (Eds.) Toward a General Theory of Action (1951) and Parsons, The Social System (1951) seem to lack sufficient orientation in power processes and to take too little account of predispositional variables to be of direct use to legal scholars. Professor M. J. Levy, Jr. of Princeton will publish in the summer of 1952 a book, *The Structure of Society*, which will explicitly apply the same general approach to the comparative study of societies.

[39] Introduction to a vast literature may be obtained through Dollard and Miller, Personality and Psychotherapy (1950); Money-Kyrle, Psychoanalysis and Politics (1951); Stanton and Perry (Eds.), Personality and Political Crisis (1951); Kardiner and Associates, The Individual and His Society (1939) and The Psychological Frontiers of Society (1945); Kardiner, The Mark of Oppression (1951) Ch. II; Alexander, Our Age of Unreason (Rev. ed. 1951); Flugel, Man, Morals, and Society (1945); and West, Conscience and Society (1945).

It is not our pretension that we can here proffer theory and techniques of the necessary perfection. Their discovery or invention will require long work by appropriate specialists. It is believed, however, that a beginning contribution can be made to one possible, over-all organization of comparative studies which might enable scholars, with appropriate skills and resources, to produce some of the information so urgently needed today.

The prime need, as we have observed, is for an organization of studies which will permit the location of any particular decisions being compared in a context which will reveal the degrees of their equivalence or non-equivalence in effects on values.[40] The organization we propose is, therefore, explicitly oriented to values and seeks to relate all decisions in a hierarchy of power processes to the values they affect.[41] It assumes that the value-shaping processes in any community, however limited or inclusive in time and space, can be conveniently described in terms of interdependent value-variables and institutions. In terms of value-variables one may describe a community process as people using such values as power, respect, enlightenment, wealth, well-being (including safety, health, character, comfort) rectitude, skill, and affection as bases to effect desired distributions of these same values among themselves and others. Institutions are the patterns of practices, the myths and techniques, the doctrines and procedures, by which such distributions are effected and may of course, vary in infinite detail from community to community.[42] Fruitful comparisons become possible when basic values

[40] Dean Pound's theory of "interests" could serve this purpose if appropriate operational indices were supplied for each interest and the various interests were explicitly related to the predispositions of decision-makers. See Pound, "A Survey of Social Interests," 57 Harv. L. Rev. (1943) 1; J. Stone, The Province and Function of Law (1946) Chs. XX, XXI, XXII. Without such amplification, the theory leaves obscure what is being compared, how the comparison is made, and by what criteria results are appraised. These consequences are apparent, despite a fascinating collection of materials, in Simpson and J. Stone, Cases and Readings on Law and Society (3 Vol. 1948). See McDougal, Review, 45 Am. J. I. L. (1951) 399, and the earlier indication of the difficulties in Dean Pound's theory in Le Paulle, "The Function of Comparative Law," 35 Harv. L. Rev. (1922) 838.

[41] The writer some years ago projected a more ambitious outline in collaboration with Dr. Karl Graf, of Switzerland, and what is presented here draws in some measure on the earlier collaborative work.

[42] More detail on this type of analysis appears in Lasswell and Kaplan, Power and Society (1950).

The UNESCO volume on Contemporary Political Science (1950) offers few alternatives. In an essay on "The Methods of Political Science, Chiefly in the United States" (at page 77), Cook writes:

"Here I wish only to urge that possibly adequate classifications may rest on major human motivations, or human needs (the two are not identical), if these can be adequately separated, for postulational and observational-experimental purposes, or as major, permanent, and virtually omnipresent institutions."

are clarified and the infinite variety of institutional detail is appraised in terms of its effects on such values.[43] For comparisons either as between communities or in a single community through time, the important general questions are: What are the structures and processes, the doctrines and practices, by which each value is shaped and shared, and what are the effects of these structures and processes, these doctrines and practices, on each other value? With respect to each value, in detail, what are the degrees of equivalency or difference in doctrine, and also in technical procedures? Thus, one may ask of any community or of a series of communities: What are the *power* structures and processes of this community? What are the roles of particular doctrines and practices in the shaping and sharing of power? What are the effects of these structures and processes, these doctrines and practices, on the shaping and sharing of all other values? What are the *wealth* structures and processes? What, again, are the roles of particular doctrines and practices and what are the consequences of the processes as a whole for all other values? And so on for each important value in the community or communities under study.[44]

An outline, though brief and at highest level abstraction, may make clearer the type of over-all organization of studies we suggest. Under the four main headings of Power Processes, Value Processes, Private Associations, and Policy Procedures, and with more or less impressionistic indication of the structure and type of inquiry under each heading, the outline follows.

POWER PROCESSES

I. Global

A comprehensive picture of the world power process must identify the participants and describe the interactions in which they influence each

[43] Bodenheimer, Review, 3 Stanford L. Rev. (1951) 755, graphically depicts a dilemma of "the Scylla of overgeneralization" and "the Charybdis of exaggerated specialization." He writes:

"If the teacher chooses the method of selecting some specific and narrow topics . . . he is in danger of losing himself in details and fostering in his students a type of specialized thinking apt to mistake the trees for the forest. If, on the other hand, he is inclined to paint with a wide brush, and to indulge in broad generalities regarding the basic differences or similarities between the world's legal systems, he takes the risk of giving an oversimplified and faulty picture."

Fulda in Review, 36 Corn. L.Q. (1950) 185, wisely insists:

"Without some fundamental philosophy which brushes aside millions of details the value of comparative law as a subject of organized study would remain obscure."

[44] Riesenfeld and Maxwell, Modern Social Legislation (1950) which is organized about the value we would describe as "well-being" indicates the potentialities of a value by value analysis.

other, the bases of their power (in control over people, values, institutions), the practices they engage in (ranging from volition-procedures to coercion), and the effects they get (in control over people, values, institutions).[45] Nation-states are still by far the most influential participants in this process and most of the important decisions in application of the doctrines of traditional public and private international law as well as of municipal doctrine are made by officials deriving authority from nation-states.[46] Inquiries that would reveal relevant predispositions and practices about the globe might be organized as follows:

A. Interactions.[47] For the admission of new groups to the formal processes of international law and organization, nation-states have evolved a curious ceremony called "recognition". The granting or withholding of this ceremony, with its attendant benefits in diplomatic intercourse and access to formal power, is used by each state against new groups as an instrument for improving its own power, and other value, position. The important questions are: who within any given nation-state is authorized to bestow recognition on another body politic; by what standards in international and national policies does the recognizing official act; by what formalities is the ceremony effected; what are the consequences in terms of access to formal authority and other values of recognition as between nation-states and with respect to the claims of private individuals; what meaning, if any, in terms of such consequences can be given to traditional distinctions between recognition *de jure* and *de facto*, recognition of governments and states, and conditional and unconditional recognition.

B. Bases of Power. The effective power of a nation-state is determined, not only by resources and geographical position, but also by its practices in controlling people and resources and the efficiency of its organization for internal and external purposes. People are controlled by selective admissions and expulsions, by differential admission to citizenship and to

[45] McDougal, Lasswell, and Leighton in Syllabus, World Community and Law: A Contemporary International Law (1950) present a detailed outline with bibliography.

[46] *Cf.* Niemeyer, Review, 4 World Politics (1952) 282:

"We need to say and repeat often that the essential prerequisites for a society, a monopoly of force and a broad consensus about the uses of such centralized force, do not exist on a world scale. This means that any rational approach to the problem of international order must take fully into account the existence of a multitude of centers, each capable of exercising a certain amount of ordering functions. The play of forces among these centers, the stability of their positions, and their power relative to each other are phenomena of fundamental importance to the problem of international order."

[47] For sake of brevity and special relevance to comparative study the general analysis is here somewhat abbreviated. A more comprehensive outline appears below with respect to the National Power Process.

the various value processes (discriminations against minorities on grounds of race, color, alienage, opinion, etc.), and by the systematic positive use of various values to secure conforming behavior (treason, espionage, sabotage, military service, compulsory labor, compulsory indoctrination, control of weapons, and so on). Non-governmental groups such as political parties, pressure groups, and private associations are managed with varying degrees of encouragement, regulation, policing or suppression. Resources and wealth processes, including the functions of allocation, planning, development, production, and distribution, are controlled in a wide range of practices between the polar extremes of regulated private enterprise and complete governmentalization. The efficiency of internal institutions in mobilizing manpower and resources into an effective military establishment, the degrees of independence, in formal authority and fact, from other power units, and the forms of alliance with other power units, for the positive support of policies, vary greatly from nation-state to nation-state. Comparative study of all these variations in bases of effective power could contribute much more to real understanding of the world power process than the customary reiteration of the doctrines of public international law about dual nationality, acquisition and loss of territory, and sovereignty.

C. Practices. The practices by which nation-states engage each other range between the polar extremes of peaceful procedures and war, and present a continuous process of attack and defense by all weapons, diplomatic, ideological, economic, and military. The important question for comparative study is, in general, how the foreign affairs power is structured, and operates, in different states. What is the structure of formal authority (constitutional pattern; division of powers between executive, legislative, and judicial institutions; division, if any, between national government and internal units) and what is the structure of effective controls (who actually makes the decisions and subject to what pressures)? How do structure and operation in any given state compare with that in others when measured by such criteria as democracy (widely shared power), efficiency (quickness, flexibility, rationality in respect to values), representativeness of national interest, responsibility to other nation-states, and maintenance of civilian supremacy? What, in detail, is the constitutional competence to negotiate and conclude international agreements, how are such agreements made internally binding within the nation-state, by what criteria do officials interpret such agreements, and by what criteria and procedures are they terminated, internally and internationally? Where, in further detail, is the war power located, what is its scope, and to what, if any, commitments does the nation-state sub-

scribe for the initiation and conduct of hostilities? Enough studies have been made to indicate the rich supplementation that might be added to the doctrines of public international law.[48]

D. Effects. The effects that a nation-state achieves, from its bases of power and by its practices, in terms of control over people and resources embrace all of the problems of the field of Private International Law as traditionally conceived.[49] The most general question is over what events (value changes) a nation-state will exercise its power to effect its own policies and with respect to what events will it limit its exercise of power in expectation of similar reciprocity in self-restraint by decision-makers in other nation-states. In specific controversies some one nation-state has effective control over persons or resources which it can use as a base for power, and the issue is whether it should exercise its power to make its own policy for the events under review, or whether, out of deference to its own long term interests or to the interests of other states or to a regional or world community interest, it should dispose of the controversy either by refusing to exercise its power or by applying policy formulated by another state. For resolution of controversies of this kind, decision-makers have customarily invoked as justifications for decision certain mystical notions of "jurisdiction", "territoriality", "nationality", "domicile" and the like, and reified derivations from "contract", "property", "tort", "crime", and so on, all of which made a confused reference at one and the same time to facts, policies, and official responses to facts. The whole body of doctrine is more than ordinarily nebulous and confused. Rational inquiry must begin by differentiating controversies in terms of significant differences in fact: who the parties are, nation-state versus individual, individual versus individual, national or non-national, corporate or non-corporate; what values (power, wealth, etc.) are at stake for the parties, for the nation-state of the decision-maker, for other nation-states, for regional groupings, and for the world community; whether the value changes contested took place by agreement or deprivation, volition or coercion ("contract", "tort", "crime", "expropriation" etc.); the *locus* of each significant event in the value changes contested (within the territory of the decision-maker, within the territory of others, on the high

[48] For examples, see Preuss, "The Execution of Treaty-Obligations Through Internal Law-System of the United States and of Some Other Countries," Proceedings of the American Society of International Law (1951) 82, and "The Relation of International Law to the Internal Law in the French Constitutional System," 44 A.J.I.L. (1950) 641; Deener, "International Law Provisions in Post-World War II Constitutions," 36 Corn. L. Q. Rev. (1951) 505.

[49] The fruitfulness of comparative study has been superbly demonstrated by Professor Rabel's monumental work: Rabel, The Conflict of Laws: A Comparative Study (3 Vol. 1945–1950).

seas, etc.) and the territorial range of the effects of such events; the *locus* of any resource affected and the type of resource (land, obligations, ships, etc.); the types of "acts of state"—legislative, executive, or judicial—that have occurred in nation-states other than that of the decision-maker; whether the nation-state of the decision-maker has "recognized" the other nation-state purporting to declare policy for the events in question; and so on.[50] With types of controversies so differentiated, comparative survey of how decision-makers located in different nation-states apply traditional technical doctrines to different controversies might permit effective appraisal of such doctrines in terms of their consequences for the values of all interested parties. It has long been demonstrated that "territorial" notions of jurisdiction are largely outmoded, that too much emphasis upon the physical *locus* of an event is irrational because what matters to individual citizens as well as to nation-states is not simply where an event takes place but the total effect on values.[51] The task of constructing a new and rational doctrine to take the place of the outmoded remains, however, a challenge to the comparative study of Private International Law.

II. National

The power process of any particular nation-state operates within the context of the world power process and both affects and is affected by the larger context.[52] Above, our principal concern was for effects upon the world process. Here our concern must include as well effects upon the distribution of values within the nation-state. Comprehensive study must again identify participants and describe arenas, of interaction and influence, methods of access or admission to such arenas, bases of power, practices, and effects. Participants may be conveniently categorized as government, political parties, pressure groups, private associations, and individuals. Government refers to the officials established by formal authority and who are expected to make the important decisions sustained by community coercion, political parties to groups who present candidates and platforms at elections, pressure groups to organizations primarily devoted to the manipulation of government and political parties, and private associations to groups primarily designed for the shaping and sharing of values other than power but which seek power effects. Individuals act in both organized and unorganized ways. In any nation-state

[50] The beginnings of such an approach are illustrated in Salonga, Private International Law (1950) Supplement I. Professor C. J. Olmstead, of New York University Law School, has in preparation a more detailed outline.

[51] Cook, The Logical and Legal Bases of the Conflict of Laws (1942).

[52] A more detailed and illustrated outline has been prepared by the writer and Mr. Edward McWhinney, of Australia.

power processes affect other value processes (wealth, enlightenment, respect, etc.) and other value processes in turn affect the power processes. Hence description may conveniently begin with the broad outlines of power processes and then develop, in spiral fashion, the details of doctrine and practice in more precise description of the role and effects of power in each of the other value processes. Relevant comparative inquiry into the broad outlines of power might, beginning with government, proceed as follows:

A. Arenas. The call here is for the interactions in which power is shaped and shared, and these may be described in terms of the interrelation of decision-makers in conventional institutional structures—constituent or amending, legislative, executive, administrative, judicial—and in effective control groups.

B. Admission. The question is how officials obtain access to positions of power, and all qualifications, elections, and appointment practices are relevant.

C. Bases of Power. The general inquiry here is how formal authority, to invoke and apply community coercion, is divided among officials. Divisions may be made between the delusively functional institutions—legislative, executive, administrative, judicial—or geographically (with varying degrees of centralization or "federalism") between national and provincial or local authorities. Comprehensive survey and comparison require a precise indication of exactly what powers are granted to what officials, over whom, with respect to what values, and subject to what conditions or limitations. Formal authority and other factors may of course invest officials with effective control over violence, resources, enlightenment, and other values, and the varying degrees of such control are unquestionably of the greatest significance to fruitful comparative study. Degrees of effective control may perhaps, however, be more easily appraised after completion of other inquiries.

D. Practices. The practices by which officials participate in the shaping and sharing range from the maintenance by coercion of a framework of order to the direct provision of goods and services. The framework of order is designed to secure within the limits of community policy the expectations created by private agreement and volition, to protect varying degrees of private control over resources, to insure individuals against arbitrary deprivations, and to maintain conformity with certain standards of rectitude in behavior. Both the maintenance of a framework of order and the direct provision of goods and services require the formation and application of policy in a series of steps ranging through the collection of intelligence, the clarification and recommendation of proposals,

authoritative enactment or prescription, invocation, interpretation, application in specific instances, and termination. The task of comparative study is to expose how these different functions are performed in different nation-states and to appraise differences in performance.

E. Effects. The effects that officials achieve by their practices require appraisal not only in terms of the degree to which power is shared but also in terms of consequences for the distribution of each major community value. Hence detailed appraisal requires more specific investigation (outlined below) with respect to each value.

Delineation of the varying roles of political parties, pressure groups, private associations, and individuals requires the asking and answering of the same fundamental questions, appropriately modified, as to arenas, admission, bases of power, practices, and effects. The importance for comparative study of party systems, pressure group operations, private association controls, and individual powers and freedoms may safely here be assumed.

Building upon this broad description of power processes, more intensive exploration of the special role and effects of power in each of the other value processes, and of the reciprocal impacts of the various value processes, can seek amplification and detailed elaboration of bases of power, practices, and effects with respect to each major value. For systematic survey and comparison we suggest for each value (wealth, enlightenment, etc.) an outline as follows:

A. Bases of Power.

1. *Formal authority.*
   (*a*) *Affirmative Powers.* The explicit grants of formal authority to government officials that may be used to affect the distribution of the value under study.
   (*b*) *Limitations.* The constitutional provisions of doctrines purporting to restrict official power which may be invoked to limit or control the exercise of the powers indicated above.
2. *Effective Controls.* The structure of political parties, pressure groups, private associations, and unorganized individual activities, with controls over various base values, that conditions the application of both powers and limitations.

B. Practices. The flow of decisions that in fact affects the shaping and distribution of the value.

1. *Formal authority.* The official decisions applying powers and limitations in shaping and distributing the value.
2. *Effective controls.* The details of how the non-governmental participants bring their influence to bear on particular decisions.

C. *Effects.* Final summary of the distribution of the value among the members of the community in consequence of the practices above and an appraisal of impacts upon the distribution of other values.

III. LOCAL[53]

Exactly the same analysis can be applied to local or provincial power processes with appropriate modification of the detailed questions. The great range of intergovernmental relations that affect local decisions increases the elaborateness of the inquiry into arenas and admissions. The wide variety of general function and special function units and the varying sources of authority in constitutions and from higher levels of government add to the complexity of bases of power. Frequent obliteration of the lines between the conventional institutions of higher levels of government (legislative, executive, etc.) makes even more important the careful specification of functions in describing practices. Effects are sometimes difficult to trace because of the fuzzy hierarchy of responsibility and the impact of many decisions. The fundamental inquiries are, however, comparable, and the potentialities of comparative study for understanding and policy guidance are no less so. Consider, for example, what careful comparative study in various countries of one principal local problem, the establishment and maintenance of an efficient physical environment, might reveal. A pooling of experience and the best contemporary wisdom about such functions as the control of community design, the regulation of land use, the provision of public services, securing improvements and development, policing, quality standards in construction and maintenance, protecting consumers against price gouging, and the administration of public controls, might lead to improvements everywhere in the performance of such functions.[54]

VALUE PROCESSES: AGREEMENTS AND DEPRIVATIONS

Working within a context of broadly described power processes, comprehensive comparative study of the details of how community coercion is employed in different nation-states to channel and control the agreements and deprivations by which individuals shape and share values in community life, may choose between a number of alternative principles of organization. The traditional principle, as we have seen, is that of

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[53] A detailed outline has been prepared by Professor W. T. Mallison, Jr., of the George Washington Law School. Our intent in the text here is to present only enough comment to indicate that the same type of analysis is applicable to any power structure at any areal or regional level.

[54] For detailed organization with respect to these problems, see McDougal and Haber, Property, Wealth, Land: Allocation, Planning and Development (1948) Ch. IX.

legal technicality which may not sufficiently transcend national peculiarities and which commonly refers, simultaneously and without discrimination, to the value changes to which decision-makers are responding, to the policies by which they justify decisions, and to the decisions that are made. Almost any alternative would seem preferable. One possible alternative would be an organization, value by value, in which each value (wealth, enlightenment, and so on) is taken separately for comprehensive and integrated investigation of the various doctrines and practices by which the community controls both agreements and deprivations with respect to that value. An alternative less disturbing to conventional legal predispositions is perhaps to organize by agreements and deprivations, but with the detailed location of both agreements and deprivations in value and institutional context. So long as all variables significant for the effective study of factors affecting decisions, of the consequences of decisions, and of the clarification of community policies are kept explicitly at the focus of attention and are not confused, the exact principle of organization is not too important. The mode of organization which we will indicate by brief comment begins, accordingly, with agreements and deprivations, and seeks to add necessary value and institutional orientation.

In a society aspiring to be free, the principal mode of shaping and sharing values is by agreement, in the broad sense of volition. Simple deference to human dignity requires that respect be given to individual volition to the extent that it can be kept compatible with over-all community policies in securing and preserving basic values for all members. The generalized task of the "law of contracts" is to establish both a framework within which individuals by their own initiative and agreement can shape and share values and certain limits beyond which volition cannot transgress upon community policies. The two most important questions for comparative study are: To what degree with respect to what values (power,[55] wealth, enlightenment, etc.) in what varying institutional contexts does this community give effect to private agreement? By what doctrines and practices does this community seek to make private agreement effective to this degree in this context? More detailed inquiry requires specification of how certain functions are performed. These may be itemized briefly as:

A. Fixing Policy Limits. Determining whether a particular agreement

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[55] Even though power processes have already been broadly described, it is necessary to continue to work with power in order to secure more and more detail of the interrelations with other values and institutional practices. One is reminded of Maitland's metaphor of the "seamless web."

in its context is within or contrary to over-all community policies. Agreements for race discrimination, for buying or selling public offices, or for locking up resources from use, may be denied community protection without further consideration.

B. Securing Intent. Making certain that there is a final expression of intent, an agreement, or behavior that should be regarded as raising expectations in others that a commitment has been made. This is the function that traditional doctrines about offer and acceptance, writing and seal, parol evidence rule, consideration, mistake, duress, fraud, conditions, competence of parties, illusory promises, and their equivalents are designed to serve.

C. Enforcement. The use of community coercion to make certain that the promised expectations actually are forthcoming or that appropriate redress is made. This is the function of the traditional remedies, such as damages, specific performance, injunction, imprisonment. The principal question is what remedy in this context of value and institution is the most economical in securing the most efficient operation of private agreement to the extent preferred.

D. Protecting Against Third Parties. Preventing third parties from interfering with promised expectations or from taking the benefits of agreements without appropriate assumption of burdens.

E. Honoring Transfer of Benefits. Determining conditions under which promisees may transfer benefits of agreements to others.

F. Construction. Determining the relations of the parties with respect to exigencies they did not foresee or foresaw only vaguely.

G. Termination. Putting an end to the agreement when it has served its purposes or when, though lawful in the beginning, it has become inimical to community policy.

H. Subjection to Community Claims. The imposition of appropriate community burdens in the form of taxation, eminent domain, and exercises of the police power.

It is reasonably obvious that with respect to all these functions both community policies and the responses of decision-makers will vary with the values primarily and secondarily at stake and with the priorities ascribed to such values in varying institutional contexts. Hence any significant comparative study of how these functions are performed in different communities must make cross-categorizations in terms both of the values affected and of an infinite variety of institutional context, such as the resource being used, the presence or absence of competition, and effects on consumers, or of in general such varying details as appear in the

contexts of insurance, construction, manufacturing, banking, labor, and so on.[56]

The kind of specification of context that is necessary, if comparative study of doctrines and practices about agreements is to be made fruitful, may perhaps be indicated by reference to certain agreements and expressions of intent which explicitly concern resources. For the parties to such agreements wealth is commonly the value primarily at stake, but other values may be involved and the degree of their involvement may make a difference to decision and to policy. Thus, with respect to agreements or expressions of intent which seek merely to transfer claims to resources from one party to another, and which in sum effect a continuing allocation of the community's resources among private users, the relevant inquiries must cover all the doctrines and practices by which community officials perform the various functions itemized in the paragraph above.[57] How are the agreements policed to insure that their objectives are within community bounds? How are parties protected from economic duress, onerous time stipulations, and other penalties? What procedures are afforded for securing clear, comprehensive, and uncoerced expressions of intent? How efficient is the public recording system designed to afford protection against third parties? Is it comprehensive, conclusive, and economically ordered? Does it enable promisors quickly and easily to establish their claims and promisees to know that they are getting what they are promised? And so on. With respect to agreements or intents that go beyond mere transfer and seek to regulate future uses of resources or claims to wealth, which seek to establish what is sometimes called "deadhand control", the inquiry becomes more complex.[58] The objectives of the parties in such transactions extend beyond wealth effects to effects on all other values. Wealth objectives include both care of dependents and successors and a wide variety of commercial purposes. Non-wealth objectives range from community (promotion of education, advancement of religion, improvement of government, relief of poverty, promotion of health or patriotism, etc., etc.) to private (preventing specified behavior—marrying, divorcing, drinking alcohol, gambling, etc.—by specified persons, or obtaining specified behavior—care of tombstones, pet animals, houses, etc.—from specified persons). The mode of restraint or deadhand control

[56] Mueller, Contract in Context (1951) indicates the difficulties in focussing traditional materials on one "long term commercial project." Kessler and Sharp, Cases on Contract (Mimeographed 1950) offer a policy orientation, though somewhat less systematic and comprehensive than we propose.

[57] For more detail, see McDougal and Haber, Property, Wealth, Land: Allocation, Planning and Development (1948) 113 *et seq.*

[58] *Id.* 246.

attempted may include the devotion of a fund to specified purposes in perpetuity or for a long period of time, shifts from one person or purpose to another upon future events, ascertainment of beneficiaries only upon some future event, restraints on the anticipation of income or principal, restraints on the alienation of specific resources, the accumulation of income, and restraints on management. The form of wealth may vary through all the protean forms of "land" and funds. The management established may or may not include persons entitled to beneficial enjoyment under the transfer. The mode of establishment may be by corporate charter, by unadorned agreement, or by "legal" or "equitable" property forms or other equivalents. Transferors and transferees vary greatly in both value and institutional position and in capacity to affect community values.

Significant comparative study must make allowance for all these and other variables with appropriate precision in survey of how community coercion is brought to bear in performance of all the separate functions itemized above. The critical questions are, in brief, to what degree, for what length of time, and by what modes will dead hand control be honored for the various purposes in varying contexts, and what are the consequences for all other problems. Answer to these questions is obscured in Anglo-American countries by the continued use of ancient doctrines which dichotomize "legal" and "equitable" interests and classify "possessory estates" and "future interests" by such temporally exotic terms as determinable fees and possibilities of reverter, fees subject to condition subsequent and rights of entry, reversions, vested and contingent remainders, executory interests, and so on. One task of comparative study might be to determine whether this language serves purposes other than of obfuscation.

As for agreements, whose purpose is primarily to plan or regulate land use among neighboring occupants, the inquiry is scarcely less complex.[59] The parties to such agreements may of course seek simply efficient use as among themselves, but they may also seek to strike directly against some basic value of the community, as by provisions that resources shall be locked up or that premises can be occupied only under conditions of race discrimination; or to interfere directly with specific community plan, as by restricting to residential purposes land marked out by the community for business or manufacturing development; or to interfere with the efficient operation of the community's planning process, as by providing that specified land shall be used only for specified purposes, such as for hitching

[59] *Id.* 475.

racks or fish markets; or to bind land as security for personal gratifications not easily commutated in money, such as for the singing of songs or the croaking of frogs; or to bind land to inefficient and outmoded practices in use and development. The land affected may be located in rural or urban areas and may be of many different forms (surface, air, light, water, minerals, oil, sub-surface, etc.). The uses affected may cover the whole community range: residential, productive, manufacturing, business, public service or utility, or governmental. Durations specified for control may be permanent, indefinite, for definite period, or temporary. The number of users permitted may include only specified parties or the public generally. The agreement may be evidenced by non-verbal behavior, oral permission, action in reliance, unsealed writing or sealed writing and may be in language of promise or language of grant. The value and institutional positions of parties to agreements may vary greatly. Comparative study must again take all these variables into account if it would resolve the mysteries of easements, profits a prendre, licenses, running covenants, equitable servitudes, and interests "in the nature of" easements, and so on, and their foreign law equivalents, and seriously attempt discovery and appraisal of the effects of differing doctrines and practices.

For protecting their members against unauthorized deprivations, for maintaining certain standards in expectation and behavior irrespective of individual commitment, communities afford various procedures and remedies. When the deprivations are of sufficiently great danger to community and individual values, the violation of authoritative community standards sufficiently gross, the deprivations may be called "crimes" and the community may itself take the initiative and impose certain counter-deprivations of varying degrees of severity, commonly called criminal sanctions, upon offenders. When the deprivations are considered to involve less threat to community interest, they may be termed "torts" or "delicts" or private wrongs and initiative in invoking measures of redress may be left to the injured parties or their representatives. Effective comparative study of how officials make these decisions and afford appropriate sanctions or remedies requires location, comparable to that suggested for agreements, in value and institutional context.

With respect to deprivations regarded as "crimes", the relevant inquiries may be indicated in broadest outline.[60] What values in what institutional contexts does each community under study protect by criminal sanctions? Who in what value and institutional position is protected

[60] For imaginative demonstration of the potentialities of a value oriented approach see Dession, Criminal Law Administration and Public Order (1948). Professor Dession is presently making wide comparative applications of his general analysis. See Donnelly, "The New Yugoslav Criminal Code," 61 Yale L. J. (1952) 510.

against whom in what value and institutional position? How in detail are conventional "crimes" related to the protection of particular values, such as power (treason, espionage, sabotage, sedition), wealth (larceny, embezzlement, fraud), well-being (homicide, assault, rape), respect (genocide, libel, peonage), rectitude (blasphemy, obscenity, polygamy), affection (adultery), skill (practicing profession without license), and enlightenment (failure to school children)? How is the community organized to formulate and apply standards for protection from such deprivations? What are the special procedures for detection, apprehension, trial, and punishment? How in detail are standards applied in fact through time and what standards, if any, over-ride all value and institutional contexts and what are related to particular contexts and types of deprivation? What defenses are permitted to offenders in various contexts in terms of immunity for age or position, coercion, mistake, mental or physical incapacity, entrapment, consent, former jeopardy, and so on? What are the sanctions invoked against particular offenses and how are such sanctions applied, administered, and terminated? What effects are achieved by various criminal sanctions in terms of securing behavior patterns in accord with established standards? What alternatives are there to such sanctions?

With respect to the deprivations regarded as "torts" or private wrongs, the relevant inquiries are similar. What values in what institutional contexts does each community protect by private remedies against deprivation? Who is protected against whom and how, again, in detail are conventional "torts" related to the protection of particular values, such as power (deprivations of access to public office, voting, and effective control groups; improper performance of official functions; false arrest or imprisonment), wealth (trespass, nuisance, ultra-hazardous activities, interference with subjacent or lateral support; conversion, negligence; unfair competition, unauthorized use of trade secrets, interference with contractual relations, misrepresentation; discrimination in hiring, firing, or tenure or in access to labor organization), well-being (assault and battery, malpractice, breach of statutory duty, negligence, ultrahazardous activity), respect (defamation, malicious prosectuion, invasion of privacy, denial of access to public utilities and institutions), rectitude (denial of access to institutions of worship, defamation of religious groups), affection (seduction, alienation of affections, interference with family relations), skill (unauthorized use of trade secrets, denial of access to professions or unions), enlightenment (denial of access to educational facilities or channels of communication, misrepresentation)? How is the community organized to establish and apply standards to such deprivations? What in detail are the standards established and applied with respect to particular

deprivations? What distinctions are made between intended and unintended harms, and ordinary and ultra-hazardous activities? What are the doctrines with respect to breach of duty, causation, and matters of defense? What particular remedies—compensatory damages, punitive damages, injunction, restitution—are made available for redress of particular deprivations? How effectively do these remedies secure the established community standards? What alternatives to such remedies are available in insurance practices or public administration or other institutional forms?

PRIVATE ASSOCIATIONS

In describing power processes it is necessary to direct attention to private associations in so far as such associations seek direct effects upon power. There is, however, the further task of investigating community doctrines and practices in promoting and regulating such associations for the primary purposes they are designed to serve. For this investigation a convenient division may be made of such associations in terms of these primary purposes, viz., between associations primarily devoted to the production and sharing of wealth and those devoted to other values.

I. Associations Devoted to the Production and Sharing of Wealth

In most general form the relevant inquiry is what forms of association are afforded to whom for what detailed objectives by what methods and how are activities policed in the interests of members and the community.[61] In common law countries the forms afforded include both unincorporated organizations (agencies, partnerships, joint stock companies, business trusts, and such informal associations as joint ventures, syndicates, and pools) and incorporated organizations (closely or widely held, privately or publicly financed). Detailed objectives of the parties include, in addition, the production of goods and services and the making of profits, the combining of wealth and effort, limited liability and flexibility in financing, minimum investment, transferability of interest, centralized management, continuity of existence, and so on. Methods of establishment range from private agreement and declarations of trust through compliance with general statutory requirements for organization or in-

[61] Though the associations under examination are labelled "private" to distinguish them from associations directly concerned with power, the formulation of problems is designed to permit comparison of associations in nation-states of varying degrees of socialization. A more detailed outline has been prepared by Professor Angel C. Cruz of the University of the Philippines.

corporation to special legislative franchise. Comprehensive description of how community coercion is brought to bear to promote and police private association requires comparison and contrast of doctrines and practices with respect to all forms of association in the handling of a variety of distinguishable problems, such as (1) the formation of the particular association, (2) financing the enterprise and determining the distribution of profits and losses, (3) management and operation, (4) termination, and (5) subjection to community claims. The type of detail relevant under each of these problem headings may with respect to incorporated organizations be impressionistically indicated as follows: formation (the role of promoters, brokers, underwriters; pre-incorporation agreements; *de facto* and *de jure* corporations; the structure of the corporate constitution in articles of incorporation and by-laws), finance (assembling of assets, stock issues and funded debts, redemption and retirement of shares; dividend policies; reductions and increases of capital; regulation for protection of investors), management (official structure and distribution of powers, corporate acts, fiduciary obligations of officials, responsibilities to stockholders and others; stockholders' powers, election of officers, derivative suits and other remedies; creditors' powers; control techniques of various groups; impact of management policies on workers and consumers), termination (sale of corporate assets, dissolution, merger and consolidation, reorganization), and subjection to community claims (taxation, eminent domain, and regulation of businesses affected with a public interest). The task of significant comparative study is to survey the handling of these type problems for all forms of association in countries of varying degrees of socialization and to appraise different forms and different doctrines and practices in terms of their impact both on the production of goods and services and on other basic community values.

II. Associations Devoted to Values Other than Wealth

The general inquiry is again what forms of association are afforded to whom for seeking what values and detailed objectives and how does the community promote and regulate such forms. Most contemporary communities afford forms of association for the shaping and sharing of a great variety of values other than wealth. Among the more obvious itemizations for several values are these: for enlightenment, educational institutions and societies, scientific and research foundations, associations for specialized communication; for well-being, charitable and philanthropic foundations, community chests, hospitals, old folk homes, employees associations; for affection, family organizations, fraternal orders, and private clubs; for rectitude, church organizations, temperance societies; for skill,

professional associations, occupational clubs; for power, patriotic societies; for respect, honorary societies, organizations for the advancement of particular groups; and so on. Methods of establishment again cover a considerable range in private agreement, declaration of trust, unincorporated association, incorporation under general law, and incorporation under special "non-profit" provision. Comprehensive survey of how community officials apply "property", "contract", "tort", and "corporation" doctrines in promoting and regulating the associations so established requires both precise determination of values at stake and institutional context and, again, the careful specification of problem in formation, financing, management, termination, or subjection to community claims. Comparative study which makes such survey could do much to reveal the varying degrees of freedom and of efficiency in promoting basic values in different societies.

POLICY PROCEDURES

In the context of broad description of power processes and the relation of doctrines and practices about agreements, deprivations, and private associations to basic community values, comprehensive comparative study for policy purposes may seek, finally, to explore in more detail the general procedures by which community coercion is organized and exercised in forming and applying policy. In traditional terms such procedures are referred to as legislative, executive, administrative, and judicial. It has long been common knowledge, however, that these words have come to refer more to institutions than to specific functions and that an institution labelled by any one of the names may in fact engage in all procedures and perform all functions. It is, accordingly, suggested that effective comparative inquiry requires a more precise demarcation of functions and that such demarcation might be in measure achieved by some such categorization as the following: intelligence, recommending, prescribing, invoking, applying, appraising, terminating. Brief indication can be offered of the type and scope of inquiry under each heading.

I. Intelligence. The intelligence function of a community is that by which it keeps itself informed and projects its plans. The performance of this function requires the continuous and systematic study of conditions and trends, inquiry into scientific interrelationships, the projection of developmental contingencies, the clarification of goal values into detailed programs, and the invention and appraisal of alternatives of action. The important question is in what degree and how well these tasks are performed in what governmental or non-governmental institutions. Comparative survey might reveal that intelligence and its use in planning are as necessary to discovering the minimum degree of authority and control

conducive to democratic values as to maintaining a maximum of governmental oppression and that it is suicidal misidentification to equate planning and regimentation.[62]

II. Recommending. This is the function of taking initiative, and exerting pressure, to secure specific decisions. Relevant investigation is of the detailed roles of political parties, pressure groups, and private associations in varying contexts. Appraisal might extend beyond condemnation of vicious practices to assay of the conditions under which more groups and individuals might participate in the processes of effective control.

III. Prescribing. This is the function of the formal enactment of policy into authoritative community doctrine. The most general questions are: How is this function divided among legislative, executive, administrative, judicial, and other institutions? How effectively is each institution organized for the performance of its role? What are the detailed practices of each institution? Appraisal may inquire whether structures and practices are democratic in their responsibility to people affected, whether they are comprehensive in taking adequate account of national, regional, and local interests, and whether they are efficient (economic and prompt) in promoting and securing such interests.

IV. Invoking. This is the function of setting in motion the community machinery for the application of policy to concrete instances. It may be imposed upon community officials (as in the case of crime or violation of charitable trust) or left to private individuals (as in the case of private wrongs or violations of the rules against perpetuities) and the important question is what difference the location of this function makes for individual and community values.

V. Applying. This is the function of applying authoritatively prescribed community policy to concrete instances. It again is divided among all the conventional institutions of government—legislative, executive, administrative, judicial—and comparative investigation requires specification of the structures and practices of such institutions in performance of the function.

Some indication of the type of specification required may be made by reference to judicial institutions.[63] These institutions afford certain procedures which the community maintains for settling controversies between contending parties. Such procedures are designed to give both officials and private individuals opportunity (access to formal authority) to test the behavior of other officials and private individuals for conform-

[62] Lasswell and McDougal, Syllabus, Law Science, and Policy (1950); McDougal and Rotival, The Case for Regional Planning with Special Reference to New England (1947).

[63] A comprehensive outline of judicial procedures has been prepared by Professors Keith Blinn, J. W. Bunkley, and George Pugh.

ity with prescribed standards and to secure the application of community coercion for maintaining such conformity. The controversies for whose settlement judicial procedures may be invoked obviously cover the whole range of community values and all institutional contexts. The important general questions are: Do procedural doctrines and practices vary in different controversies depending upon the values at stake and differences in institutional context? If so, are such variations based upon rational conceptions of how best to promote the various values in differing contexts? If not, should such variations be made for such purposes? These questions may be made concrete with respect to such various procedural steps as the following: for taking hold of the defendant, for taking hold of the subject-matter of the controversy, for determining place and time of hearing, for enlightening the tribunal and the parties concerning claims and demands, for disposing of the controversy through agreed settlement, for presenting proof at trial, for determining conflicting claims and ordering appropriate remedial action, for appeal and review, and for executing judgment and enforcing remedial measures. Policy criteria for appraising procedures may be sharpened in terms not only of efficiency in promoting particular values but also of certain over-riding community goals, such as equal opportunity to a fair hearing, decision in accordance with the prescribed policies of the community, affording as much economy to all parties as is consistent with other values, affording maximum respect for human dignity with a minimum invasion of privacy or exercise of violence, securing a maximum effect on the enlightenment processes of the community and in ceremonializing the community values at stake, eliminating biased and prejudiced decision-makers, and encouraging a maximum use of scientific knowledge in ascertaining facts and shaping remedies.

VI. Appraising. This is a detailed application of the more general intelligence function to continuing survey of the consequences of policy prescriptions and applications. Comparative investigation is not likely to reveal common occurrence.

VII. Terminating. This is the function of putting an end to obsolete prescriptions of policy. Commonly the function is performed by new prescription. Special study of techniques for periodic revision and for resolving conflicts between prescriptions of differing times may, however, be useful.

With some such comprehensive framework of guiding theory, it might be possible for comparative study to rise to the challenge of contemporary need and make its contribution to the more perfect union of the free world and to the eventual organization of security and freedom throughout a peaceful world community. Such a framework of theory would permit

sufficiently precise description of the events to which decision-makers respond in terms of value changes which transcend the doctrinal peculiarities of particular nation-states; it would require the investigation by all the techniques of modern science of how predispositional factors affecting decision, such as character structure, class position, skills, and attitudes, vary from nation-state to nation-state and from context to context within nation-states; and it would, hence, make possible a meaningful survey through time of how different decision-makers, with their varying predispositions, appropriately located in different nation-states apply technical doctrines of varying degrees of equivalence to comparable problems to achieve identifiable effects on values. The importance for policy, for the freedom and rationality of future decision, of the knowledge that might be so obtained is beyond present calculation. Communities might find, as individuals have found, that insightful knowledge of the past and clear prevision of future alternatives immeasurably increases potentialities. Though the universals it yields may ultimately be few, comparative study at its best might reveal the details of short-term, emerging relationships with unexpectedly high probability.[64] Though it may never induce change in basic democratic values, such comparative study might also supply the continuing flow of knowledge by which specific operational interpretations can be given value goals and such goals be kept up to date. Enlargement of the context of community and power processes being observed can certainly be expected only to enlarge knowledge of expedients and alternatives and increase the possibilities of invention. The hope that comparative study for policy purposes offers is, in sum, that of understanding the power and other value processes in which we live and of achieving the special insights necessary to effective cooperation and survival in the contemporary world. Denied the experimental method open to the physical sciences, applied legal science has no rational alternative to such study. Should the challenge outlined appear too formidable, it may be relevant to recall the principle, once invoked by a great comparative scholar,[65] that "the standard of human performance is apt, though not sure, to rise in proportion to the magnitude of an undertaking."

[64] The exposure of past rigidities in behavior may, it will perhaps bear emphasis, increase appreciation of opportunities for future change. The function of science in legal study is not so much that of predicting inevitabilities, as of stating the conditions of freedom.

[65] The late Ernst Freund. Cf. Margaret Mead, "The Comparative Study of Culture and the Purposive Cultivation of Democratic Values," Conference on Science, Philosophy and Religion (1942) 56, 65:

"Comparison of different cultures demonstrates that man may set his spiritual goal low or high, that he may cast himself a cheap or a heroic role, and that as he casts himself, so will he live and his children after him."

ERNST RABEL

The Hague Conference on the Unification of Sales Law

TWENTY-THREE YEARS AFTER ITS PREPARATION started, the draft of a uniform (substantive) law on international sales of goods[1] has been discussed by a diplomatic Conference. The Conference was held at The Hague in November 1951 under the auspices of the Netherlands Government, immediately following the Seventh Hague Conference on Private International Law. Twenty states sent delegations, and five states, including the United States, were represented by observers.[2] Moreover, the Dutch Government had enlarged the scope of the Conference by appropriately inviting the Economic Commission for Europe of the United Nations and the International Chamber of Commerce. The International Institute for the Unification of Private Law in Rome, which had sponsored the long work of formulating the draft, presented it to the meeting; the President of the Institute, H. Exc. Massimo Pilotti, was elected chairman.

I have reported to the American profession on the projected unification, first with respect to the original draft of 1935, submitted by the League of Nations to the Governments and on which most of these usefully commented,[3] and more recently on the revised draft of 1939 and its relation to the Proposed Commercial Code of this country.[4] I beg to refer to these reports, in order to devote the following pages to the results of the recent Hague Conference, with particular reference to the extent to which we may infer from the attitude of the meeting an authoritative universal vote on the main lines of a modern sales law.

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[1] Projet d'une loi uniforme sur la vente internationale des objets mobiliers corporels, U.D.P. 1939—Projet I (i); also in Unification of Law (Rome, 1948) with English translation. [International Institute for the Unification of Private Law.]

[2] In addition to the United States, represented by Mr. Ch. P. Clock of the Embassy as observer: Austria, Belgium, Bolivia, Chile, Cuba, Denmark, Finland, France, Germany, Great Britain, Greece, Ireland, Italy, Japan, Luxembourg, Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Vatican City, Yugoslavia.

[3] Rabel, "A Draft of an International Law of Sales," 5 Chi. L. Rev. (1938) 543.

[4] "International Sales Law" in Lectures on The Conflict of Laws and International Contracts, Summer Institute on International and Comparative Law, University of Michigan Law School (1951) 34. See also "The Sales Law in the Proposed Commercial Code," 17 Chi. L. Rev. (1950) 427.

It is true that the Conference was called for a mere ten days, which in international legal affairs barely affords the time for a cursory first reading. For this reason, no definite results could be expected, and whatever suggestion was advanced, would simply be referred to a Committee elected at the end of the session for revision of the draft.[5]

Nevertheless, it was not only a large but a highly competent gathering. And it was on this occasion invited to consider a completely worked out set of proposals in 105 polished articles, carefully preceded by vast comparative research and thoroughly discussed for years by a small committee representing the four main systems of Western private law. Thus, the debates could penetrate into the chief problems of the matter, allowing an over-all impression of the manner in which the intentions of the draftsmen were received by these expert lawyers. In fact, to the gratification of everybody, the Conference was distinctly favorable to the Project. In particular, no objection was raised by the delegates of the states to the basic features of the draft, which may be described under three aspects.

Scope and Purpose

In the first place, the appropriateness of the whole enterprise has been confirmed. Certain sections were criticized as seemingly complicated, but the simplification desired was calculated to remove timid restrictions on the uniform effects. What this means must be estimated by remembering the host of warnings encountered when the initial steps were taken. Unification, it was feared, would be impossible in this central field of the deeply divided national laws. Differences between French and German laws or between European and Latin-American codes, let alone the harassing institutions of common law, were deemed insurmountable barriers. Not laws—statutes, decisions, literature—but commercial contracts might add up to unitary rules. Once again, the lawyers were admonished to let commerce alone.

In the atmosphere of the Rome Institute, from its foundation under the presidency of Vittorio Scialoja, one of the greatest jurists with whom I have been associated, such doubts did not cause a moment of hesitation. As a matter of course, far from limiting its scope to the European continent, unification had to be universal. Eminent English lawyers have always actively participated in the work of the Institute. Among the legal materials collected as precious tools, common law has had an outstanding

[5] Members are the Delegates V. Angeloni (Italy), A. Bagge (Sweden), F. de Castro y Bravo (Spain), L. Frédéricq (Belgium), M. Gutzwiller (Switzerland), J. Hamel (France), E. M. Meijers (Netherlands), E. Rabel (Rome Institute), H. Ussing (Denmark), B. A. Wortley (Great Britain), and a member to be designated by the German Federal Republic.

place. Scialoja, an idealist of realistic resignation, sent the sales committee on its way with the request that, were the members unable to agree on one set of proposals, they should come back with two or three drafts. Never did such a contingency materialize. In very few instances has national diversity endangered a complete *consensus omnium*.

Some doubt has lingered on respecting the difficulty of inserting a universal sales law of a new pattern into the remaining national laws of obligations and property. Analogous experiments, however, were successfully made long ago, not only, under privileged conditions, by the British and American Sales Acts and the Scandinavian Uniform Sales Law, but also by the former German Commercial Code of 1861, which intruded into a mass of quite heterogeneous private law systems. No objection appeared in the Conference in this respect.

Second, the delegates were satisfied with the task as conceived by the draftsmen. This task is complicated. The proposed uniform law is to govern only and totally the mutual rights and duties of seller and buyer arising out of the sales contract. Transfer of title and the rights of third persons are excluded; their unification can be only an ulterior accomplishment. In its own field, the draft must refrain from entering into anomalous or complicated situations. It need not decide all existing controversies, keep abreast of all lines of decisions, foresee all future quarrels. It has to set forth the basic rules in simple and clear language and to solve the usual and typical conflicts. Within its corners, however, the text must be self-sufficient. Where a case is not expressly covered, the text is not to be supplemented by the national laws—which would at once destroy unity—but to be construed according to the principles consonant with its spirit (Article 11). Thus, a fairly coherent codification is necessary, capable of being adopted without great changes as an internal commercial statute.

This elaborate body of rules, nevertheless, at this initial stage of unification, is only intended to apply to "international sales," precisely defined. It would replace all conflicts rules, national and international, and the substantive laws of obligation invoked by the applicable conflicts rules. It would leave the national systems in full charge of the purely domestic transactions, that is, of the immense majority of cases. No one has asked for a modification of this delimitation, originally proposed by myself for tactical reasons, although all the time I have vainly hoped to be overruled. A broader definition of "international" sales than in the draft, though, has been suggested.

Third, the character of the rules has been plainly approved. They purport to present an adequate system and sound and fair solutions. The

search for the right problems and answers has been helped by the methods of descriptive, analytical, and critical comparative law, including statutes, decisions, business conceptions and habits, and legislative techniques. No heed has been given to national prestige, inveterate juristic prejudices, or the awesome relics from the dead past that populate in amazing multitude the older codifications of sales law, an unromantic place, little appropriate to the functions of a museum of legal antiquities. Existing rules carried suggestion, not domination.

It is one of the most encouraging occurrences of this Conference that, although the great majority of delegates came from civil law countries, practically no attack was directed against most of the very conspicuous elements of the draft influenced by common law. English doubts were equally restricted to certain well-known contrasts to be recalled below.

If the vaunted abyss between the common law and the Romanistic tradition largely vanished in the exchange of views among lawyers, cooperation in another direction was sometimes harder to obtain. Certain business leaders so much dislike interference by lawyers with their specialized and refined standard contracts that they simply do not want unification. Well, their mistrust is largely deserved in view of the anarchical lack of coordination between the territorial laws, as if no international private life and activity existed. But this very absence of a world system needs correction. Accordingly, the Conference ignored a proposal that the uniform law should be limited to the imperative rules which cannot be based upon contractual practice, such as those concerning limitation of actions or validity of contracts. Without barring any freedom to create special types of sales, their ground must be provided by a system of subsidiary, rather than imperative, rules. International commerce needs a legal, solid, and universal basis.

Continued discussion soon revealed promising mutual recognition between the delegates of the governments and the business representatives. An eventual definitive agreement is in prospect. As Judge Bagge reminded the audience, ample evidence of the needs of business had been collected long ago by the sales committee. It remains chiefly to investigate what may have changed during the intermediate period of time. According to my personal information, this is not much in matters really decisive for legal basic rules, as contrasted with the economic and political situation. Experts will be interviewed again on such particular questions as whether it still corresponds with existing conceptions that the seller ought to tender bills of lading in the old sense of the regular document, received for shipment bills being admissible only by exception according to usages (Arti-

cle 19, Par. 3); which place, that of the seller or the buyer or the payment, should determine the official rate of interest, upon which the draft (Article 86) bases damages for default in payment of the price; or whether the seller shall have the right of curing a faulty delivery, even though he had not contracted to manufacture the goods on the buyer's special instructions (Article 45, 2)—questions lacking and needing a uniform solution.

A more important field of co-operation is suggested by the visibly increased interest of importers and exporters in a wider unification of standard conditions. The Rome draft deliberately refrained from formulating an interpretation of the various clauses used in international trade, with the exception only of stating at what point an F.O.B., C. & F., or C.I.F. seller is deemed to make the shipment which ends the accomplishment of his positive duties and transfers the risk of loss to the buyer (Articles 104 105). The draftsmen were impressed by the Scandinavian experience; there, legal definition of the various clauses had resulted in failure to satisfy the continuous fluctuation of business habits. Professor Alten, the distinguished Norwegian delegate, strongly re-emphasized this fact. Yet, recently, business organizations have progressed in unifying the clauses. New York exporters seem considerably more inclined to favor uniformity within the country and without, than when the "Incoterms" were issued, and it is characteristic of the Western European trend, as the German *Industrie- und Handelstag* writes, that in the last two years the Incoterm publications have been in enormously increased demand. Final success, however, is frustrated, apparently because mere persuasion has not the power of eradicating all the different port usages and other accustomed ways. There is noticeable in business circles a current in favor of unification by clarifying enactment, and this is manifestly the background of the numerous sections in the Proposed Revised Sales Act laying down the meaning of standard clauses. Likewise, many merchants do not see how an international sales law can fail to unify the typical conditions on a world-wide scale.

Here indeed, we have an interesting new situation. The lawyers are reserved; the business leaders do not consider themselves powerful enough. Both ought to work in common. It remains true that legal rules in the ordinary sense following the Scandinavian or the new American model, are inadvisable in a durable multilateral treaty. Therefore, I have proposed that the treaty should be accompanied by an appendix, to be elaborated by the draftsmen in collaboration with the Offices of the United Nations, the International Chamber of Commerce, and the International Law Association. In this, a considerable number of usual conditions would be exactly defined. The list might be amended independently of the main

treaty. But additions are preferable to corrections. The right method to satisfy new habits is their expression in a new clause. As an example of desirable differentiation, we may recall the ascent of the clause F.A.S. in the American practice, stipulating the bringing of the goods alongside ship, whereas the old F.O.B. clause in many ports is in dubious use; it should always mean bringing above the railing. Stubborn individual misuse, e.g., of C.I.F. for a mere agreement on costs, will best be countered by the educational effect of an authoritative glossary. This proposal found sympathy with eminent colleagues.

Differences of Legal Systems

The concept "breach of contract," so distinctly developed in the common law, and forming at least the basis of French law, affords a simple line of thought. A contractual debtor is responsible for any kind of nonperformance, unless he proves that his failure is due to an event recognized as an excuse. In this system, the concept of fault has no primary significance. Default is taken in an objective sense, meaning failure of entire, correct, timely performance, not necessarily a failure by fault, as the Romanistic *mora* (*demeure, Verzug*). Also, no conceptual importance is attached, as in many foreign systems, to the distinction between temporary and permanent nonperformance; nor to the contrasts among absolute and relative impossibility, inability, frustration, and so forth, although modern Anglo-American writing has taken notice, perhaps not so happily, of these categories. This is also the ground on which the draft is established. Reasoning and formulation is so much easier and more satisfactory than with the German Code and those following it, that no criticism was expressed at the Conference. Also the finally adopted formulation ot accidental events excusing a debtor (Article 77), inspired by the succession of English cases, although it was influenced by German generalizations and amounts to a cautious "*clausula rebus sic stantibus*," has been expressly approved.

The most striking practical gain has been derived from the common law doctrine of damages. General damages as the regular and minimum award, and special damages if the defaulting party had to contemplate the respective damage in contracting, as well as many particulars of this subject agree with American practice—though of course not its terminology—and disagree with specific foreign provisions.

"Reasonable time," the elastic term which has proved adequate for the British Empire and the United States, has been borrowed for the equally vast expanse of an international law, to serve as time limit for delivery, examination of the goods, and notice of defects.

On the other side, the modern aims of the draft were irreconcilable with the antiquated concepts of the Uniform Sales Act. To many American lawyers the Act has become too familiar to shock them by its superannuated structure. They might rather resent a list of all its shortcomings patched over by a patient practice, that have to be noted on the occasion of a new codification. However, if once I had to denounce some of the unacceptable doctrines of the common law, there is no need to expound this theme any longer. The proposals of the Commercial Code have confirmed almost every criticism and joined almost every reform realized by the Rome draft. Only one very striking exception has been made by the awkward attempt of the Code to maintain the superannuated Statute of Frauds, "so distasteful to justice and so hurtful to the whole community,"[6] which no international, or for that matter, no commercial law of our time may reasonably reiterate.

This is not to say, of course, that no controversies flowing from different national backgrounds can or do exist any more. What happened at the Conference in this respect is most instructive in diverse ways.

For the draft, only the question of an action for specific performance manifested a contrast between common law and civil law too deeply rooted to be eradicated. It had to be compromised rather than satisfactorily answered by a uniform rule. Under the draft (Articles 25 (1) and 64 (1)) every court admits or refuses judgment for execution *in natura* according to its own law. The action, however, is to be rejected even in continental courts in case cover on the market is an easy or customary substitute for delivery. The Conference approved but for minor points.

There is also no serious opposition against formless and unilateral rescission in countries where "resolution" of the contract requires judicial action and discretionary judgment. It is interesting to note that in Holland and Luxembourg some business associations have expressed discontent with this reform; they like the intervention of a court. Thus, what comparative lawyers regard as a development that speaks for itself may be disowned in some quarters. But at least in the international field a return to Article 1184 of the French Civil Code, practically obliterated in French commercial practice, is excluded.

More troublesome phases concern the problem of how severe the sanctions for failure of precise delivery should be. The systems vary from the most rigid view, as in England and Scandinavia, to the most indulgent, followed by the French provision just mentioned.[7] After long discussions,

[6] Willis, W., Contract of Sale of Goods (ed. 3, 1929) 110.

[7] See the survey in Rabel, Das Recht des Warenkaufs, (Berlin-Leipzig, 1936) vol. 1, 342 ff.

the Rome proposals advocate a system close to, though not identical with, the German Code, which recently has also been followed by the Greek and Italian Civil Codes.[8] As respects the most important application, viz., that to the duty to deliver the goods at a given time, a distinction is made whether or not the time fixed in the contract or the usages is of the essence of the contract. Note that this was the very idea of Section 10 of the British Sales of Goods Act. If the goods have a current price on the market, a difference of time is exactly evaluated by the difference in the market quotations or values, and the transaction bears an aleatory element; in this case the draft presumes that time is essential. Otherwise, in the absence of one of the usual clauses indicating the necessity of strict performance—as for instance any time prescribed for loading in overseas trade—the buyer has to take the initiative in case he wants to reject future delivery. He should declare that he will accept the goods within a specific reasonable time and will afterward refuse them. English and American parties are accustomed to a similar practice, but their lawyers insist that they cannot be bound by law to this effect. Judge Bagge of Sweden is quite adverse to this supplementary reasonable time, the German *Nachfrist*. In this view, when the time of delivery expires, the buyer may cancel the contract and ask for damages at once.

The sellers in continental Western Europe, on their part, are incensed at the idea of treating every ordinary transaction as if it were a highly speculative overseas sale of wheat or rye. In a postwar period full of obstacles to production and trade, they feel less than ever able to cope with absolutely severe time limits. The English system is adapted to English fairness. How would the faculty to cancel any transaction immediately in a declining market be misused by less decent purchasers? And would not the seller, expressly denied deferment in delivery by the law, counter on the ground of exoneration by accidental impossibility and so unleash litigation after all?

We have tried many suggestions to reconcile these views, only to return always to the solution of the draft as fair and practicable. Certainly, this is a delicate point, open to new debates in the Committee. The duty of the seller to cure defective delivery is also slated for reconsideration. The laws differ widely, and experts should be heard again.

Finally, the draft has followed the Anglo-American principle that warranty of quality entails responsibility for damages. Whereas this principle seems to derive from the origin of warranty in the action for deceit, the Roman sources led civil law to the conception that, as warranty does not require fault as normal liabilities do, it also does not include damages.

[8] Civil Codes of Germany, §326; Greece, art. 383; Italy, art. 1454.

Yet the practice in France, Germany, and other countries has riddled this idea with exceptions. It is thought that in this case the full burden imposed by English law on the seller will be conceded by the merchants of other countries, who are no less proud of their merchandise than the English. The draft takes the risk of a unification to this effect. No opposition was advanced.

Warranty, however, is an intriguing subject also in other respects:

Warranty for Quality

The Rome draft has made considerable progress over the present chaotic Romanistic laws, but needs final perfection. American development shows the way, without itself reaching the ultimate stage. I confess that, only progressively in the course of the last fifteen years, have I myself understood the historical process by which in all systems without exception, though with all possible shades of local coloring, warranty has developed from the original *caveat emptor* rule into a separate contract—this was really meant by the expression, "collateral" obligation—and is more recently being transformed into a part of the sales contract.[9] In the international draft, the various cumbersome peculiarities of the Romanistic *redhibitio*, varying according to jurisdictions, are suppressed; this is replaced by ordinary rescission. The other old action, *quanti minoris*, for reduction of the price, is presented in its best form under "relative calculation." This may be identified with partial rescission occurring in other situations. By the general addition of damages, the remedial side of warranty closely approaches the effects of breach of contract, as well as the American draft, which in the same spirit shifts from breach of warranty to breach of contract.

But another reform is missing, namely an enlargement analogous to Section 49 of the Uniform Sales Act. This section, requiring notice of defects to preserve not only the right of rejection but also the right to damages, prescribes notice of any objection to a delivery. In continental history, the duty of notifying defects has developed only in the domain of defects recognized in the wake of the edict of the *aediles* and, therefore, does not include cases of late delivery, delivery of articles of wrong description (*aliud*), or of a wrong quantity. Innumerable difficulties have ensued from this distinction between *vitia* and nonconforming goods, or between warranty and nonperformance. Directly contradictory theories arose in the different countries. But in the spell of this turmoil,

[9] Rabel, "The Nature of Warranty of Quality," 24 Tulane L. Rev. (1950) 273 ff. To demonstrate the full measure of the evolution in both common law and civil law, no less than nine chapters of the second volume of *Das Recht des Warenkaufs* (to be published), had to be used.

very seldom does there seem to have been wonder why the seller's interest to know without delay of a criticism affecting his business operations should be so much less protected outside the vague sphere of "defects." The German Commercial Code of 1896 (Article 378) to some extent diminished the judicial burden of the distinction. The Rome draft (Article 37) contributes an improvement to the same purpose. However, the true model ought to be the Uniform Sales Act, improved by the draft of a Commercial Code insofar as it uses the category of goods or conduct conforming or not conforming to the contract. It can be shown that the draft is easy to amend to the same effect and would gain thereby a radical simplification and unification of its arrangement, as is now directly desired by the Conference.

By an analogous reasoning on this line, the short limitation of action, provided for the breach of warranty in civil law codes (with various periods of time), should be enlarged and extended. The American draft, indeed, provides a uniform period of limitation, but its duration of four years is monstrous. The one-year period of the Rome draft for warranty is quite appropriate also to any nonconforming delivery after notification to the seller in due time.

Conclusion

Thus, the Conference proved friendly to the plan. The delegates, however, expressed some doubts on particular subjects and charged the new Committee with the examination of numerous suggestions. It is too early to presume that a uniform law of international sales will be achieved. There is only hope for its final arrival, but good reason for such hope.

Nevertheless, a few experiences may be pointed out even now in a Journal initiating a period of higher cultivation of comparative studies in the United States.

I am strongly convinced that no international agreement on legal matters should be considered without the widest and most profound comparative research possible. Many a conference has miscarried or produced unsatisfactory treaties because it was not sufficiently prepared by a complete supranational survey over its field. Diplomats ought to understand this requirement; it is true that this also is not known to many lawyers.

Again, comparative work on concrete legal problems (as contrasted with methodology or legal philosophy) has often failed when extended to abstract theories. For quite a time to come, our task will be enormous, even if restricted to rules and facts. One of the first lessons a comparative student is likely to learn, is how much more readily judicial decisions on

analogous case situations can be compared than statutes and doctrines. Similar issues and results have grown more and more frequent in the modern world, despite all the differences of legal education, method, terminology, and reasoning. Related conceptions emerge in a variety of forms. Where, moreover, the powerful force of business strives anew toward legal unity, as it once did, producing the great success of a "general law merchant," the courts are prompter than the statutes in reducing and avoiding inherited outmoded principles.

When the first volume on comparative sales law was published, some readers were frightened by the kaleidoscopic survey of the existing divergences. This chaos, they thought, could never be mastered. This was a wrong impression. The rules have to be analyzed and dissolved into cases to study their effects. Finally, exactly as within the United States, diverse currents compete, and there is a sound tendency in decisions and annotations to prefer the more recent trend, provided it is reasonable. It is the better adjustment to the necessities of international life that counts in selecting the uniform rule. There is something, after all, to the "nature of things" to which the authors of the Austrian Civil Code ultimately referred the judges. Restatements are suggestive if they are progressive.

What will happen to the international draft in the United States, considering the special situation of forty-eight states and the minor or external peculiarities of the Revised Sales Act as proposed in the Commercial Code, I am in no position to predict. I only want to be allowed to touch a preliminary question, that of the form in which to present such a proposed world law to Americans.

The makers of many American statutes firmly believe that rules and truths must be offered in old ritual forms surrounded by a shrubbery of exceptions and counterbalances. For American consumption, the rules of the proposed Code, equivalent to rules of the international draft, would have to undergo a thorough transposition. In fact, since I was impressed by these operations, on my own suggestion a fine British scholar made an attempt to rearrange and express the Rome statements in imitation of English statutes. The result was rather comical. I have come to wonder whether in fact an average American businessman will find reading the international draft in a suitable translation more difficult than the American proposed Sales Act. In an English version, of course, it is possible to avoid the particular exigencies of French legal style in the masterful text that we owe to Joseph Hamel.

International unification of commercial law is on its way and cannot be prevented forever. The sales contract is a natural starting point. Sale

was the institution of remote antiquity that, surpassing the development of gift and barter, under the hands of the Roman jurisconsults grew to be the model of a contract, bilateral and consensual, and imbued with the precepts of *bona fides*. Time and again, the sales contract has operated in an analogous function as the principal creator of conventional obligations. Ancient as it is in its essentials, it is the most used contractual type and the greatest aid to the exchange of goods in national and international economy. Once more true to its historic leadership, it might prepare the evolution of what we hope will in time be an international law of private obligations.

ARTHUR T. VON MEHREN

Constitutionalism in Germany—The First Decision of the New Constitutional Court

THE DECISION HANDED DOWN BY the new German Constitutional Court, the Bundesverfassungsgericht, on October 23, 1951,[1] exercised for the first time the power to set aside federal legislation given to that court by the Basic Law. The establishment of the Constitutional Court, provided for in the Basic Law for the Federal Republic of Germany, by the Law on the Constitutional Court of March 12, 1951,[2] completed a constitutional evolution which had its beginnings in the Weimar period. The institution of judicial review has, for the first time, become a part of the scheme of German public law and is now an integral element in the constitutional structure under which the Federal Republic of Germany hopes to develop and preserve a free and democratic society. The establishment of the Constitutional Court thus marks the completion of one constitutional evolution, and its first decision the beginning of another—for the future of judicial review in Germany will depend, in a large measure, upon the skill and insight with which the Constitutional Court discharges its task. The decision of October 23, 1951 as the initial step in this second evolution is of special interest. Before discussing the decision, it is necessary to sketch, first, the constitutional evolution which the establishment of the Constitutional Court completed, and second, the political background of article 118[3] of the Basic Law and of the two federal laws, en-

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[1] See Appendix to Bundesanzeiger, No. 215, of November 6, 1951.

[2] Gesetz über das Bundesverfassungsgericht, Bundesgesetzblatt 1951. I. 243–54.

[3] This article provides as follows:

"The reorganization of the territory comprising the Länder Baden, Württemberg-Baden and Württemberg-Hohenzollern can be affected, notwithstanding the provisions of Article 29, by agreement between the Länder concerned. If no agreement is reached, the reorganization will be regulated by a federal law, which must provide for a referendum."

See also article 29 of the Basic Law which provides that:

"(1) The division of the federal territory into Länder is to be revised by a federal law with due regard to regional ties, historical and cultural connections, economic expediency and social structure. Such reorganization should create Länder which by their size and capacity are able effectively to fulfil the functions incumbent upon them.

"(2) In areas which upon the reorganization of the Länder after 8 May, 1945, became, without plebiscite, part of another Land, a specific change in the decision then taken regarding the Land boundaries can be demanded by popular initiative within a year from the coming into force of the Basic Law. The popular initiative requires the assent of one-tenth of the population entitled to vote in Landtag elections. If the popular initiative receives such assent the

acted under article 118, whose constitutionality was considered by the decision of October 23, 1951.

I. The Constitutional Evolution

Judicial review of the constitutionality of federal legislation was never part of the tradition of German public law. The courts during the Weimar period did set state legislation aside on constitutional grounds.[4] These decisions were, however, only a specific application of the general principle that federal law, including constitutional law, prevailed over state law. Neither the habits of German legal thinking, with its emphasis upon the legislative source of law, nor the historical position and functions of the courts in Germany have been such as to encourage the development of judicial review. Furthermore, it was not until the Weimar Republic that the question of judicial review became actual in Germany. However, the Weimar Constitution neither provided a constitutional structure within which effective judicial review could have easily developed[5] nor did it settle clearly the question whether judicial review was, as a matter of principle, permissible.[6] Against this background it is not surprising

Federal Government must include in the draft of the reorganisation law a provision determining to which Land the area concerned shall belong.

"(3) After the law has been adopted, such part of the law as provides for the transfer of an area from one Land to another must be submitted to a referendum in that area. If a popular initiative received the assent required under paragraph (2), a referendum must in any event be held in the area concerned.

"(4) Insofar as the law is rejected in at least one area, it must be reintroduced into the Bundestag. After it has been passed again, it requires to that extent acceptance by a referendum in the entire federal territory.

"(5) In a referendum the majority of the votes cast decides.

"(6) The procedure is established by a federal law. The reorganisation should be concluded before the expiration of three years after promulgation of the Basic Law and, should it become necessary as a result of the accession of another part of Germany, within two years after such accession.

"(7) The procedure regarding any other change in the territory of the Länder is established by a federal law which requires the approval of the Bundesrat and of the majority of the members of the Bundestag."

The translation of the Basic Law given in this article is the one prepared by the Office of the U. S. High Commissioner for Germany. See Basic Law for the Federal Republic of Germany (1951). Translations of all other German materials have been prepared by the author of the article.

[4] See, *e.g.*, Decision of 15 December 1921, First Criminal Senate of the Reichsgericht, 56 E R G (St.) (1921) 177.

[5] See pp. 72–74, *infra*.

[6] This question, which was not at that time a party matter, was discussed at considerable length in the Constitutional Committee of the National Assembly which drafted the Weimar Constitution. Preuss favored judicial review, regarding it as basic to a state based upon the rule of law (*Rechtsstaat*). He argued that a tradition of judicial review would establish itself unless expressly forbidden. Kahl objected to judicial review because it would place the courts above the law instead of subjecting them to it. Ablass, who opposed judicial review, proposed an amendment to what became article 108 of the Weimar Constitution which would have given the Staatsgerichtshof the right to review the constitutionality of legislation at the re-

that the subsequent handling of this question by the courts was wavering and indecisive. Some decisions proceeded on the assumption that the courts had the power and duty to determine the constitutionality of federal legislation.[7] And a number of legal writers argued for the administration of constitutional guarantees through judicial review.[8] But, before these developments had a real opportunity to achieve wide acceptance and to establish a tradition of judicial review, the events of the early thirties brought about a full return to the traditional German position, that the courts have no power to set aside federal legislation on the ground of unconstitutionality.[9]

Even before it was subverted by Nazism, the structure of the Weimar Constitution was such as to render difficult the development of a tradition of effective and meaningful judicial review. In the first place, many of the provisions of the Weimar Constitution were, or could be considered, programmatic and without precise legal content. The basic rights provisions contained in articles 109 through 165 of the Constitution, for example, were often more in the nature of pious hopes than enforceable legal rights.[10] Second, these basic rights were further weakened by constitu-

quest of one hundred members of the Reichstag. The amendment was defeated by a vote of eleven to ten. See 2 Verhandlungen der Verfassunggebenden Deutschen Nationalversammlung (1920) 483–86.

[7] See, *e.g.*, Fundamental Decision of 21 November 1924, Grosser Senat of the Reichsversorgungsgericht, 4 E R V G (1925) 168; K. v. M., Fifth Civil Senate of the Reichsgericht, 111 E R G (Z) (1925) 320; Prussia v. German Reich, Staatsgerichtshof, 122 E R G (Z) (1928) p. 17 of Appendix; Prussia v. N., Third Civil Senate of the Reichsgericht, 124 E R G (Z) (1929) 173. For discussions in English of these developments see Friedrich, "The Issue of Judicial Review in Germany," 43 Pol. Sci. Q. (1928) 188; Lenoir, "Judicial Review in Germany under the Weimar Constitution," 14 Tul. L. Rev. (1940) 361.

[8] See, *e.g.*, Triepel, "Der Weg der Gesetzgebung nach der Neuen Reichsverfassung," 39 Archiv des Öffentlichen Rechts (1920) 456, 537–38; Morstein Marx, Variationen über richterliche Zuständigkeit zur Prüfung der Rechtsmässigkeit des Gesetzes (1927) 149–50, 156–57; remarks of Triepel, in 4 Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer (1928) 89; Buschke, Die Grundrechte der Weimarer Verfassung in der Rechtsprechung des Reichsgerichts (1930) 7–9. The dominant opinion, which opposed judicial review, is expressed by Anschütz, Die Verfassung des deutschen Reichs (12th ed. 1930) comment 2 (V) to art. 109, pp. 466–67. See also Schmitt, "Das Reichsgericht als Hüter der Verfassung," in 1 Die Reichsgerichtspraxis im deutschen Rechtsleben (ed. by Schreiber, 1929) 154; Schmitt, Der Hüter der Verfassung (1931) especially 1–36. The arguments pro and con on this question advanced during the Weimar period are summarized in 1 Stier-Somlo, Deutsches Reichs- und Landesstaatsrecht (1924) §98, pp. 674–77.

[9] See, *e.g.*, P. v. Landkreis K. -Kr., Third Civil Senate of the Reichsgericht, 142 E R G (Z) (1933) 56; *cf.* Mast, Das richterliche Prüfungsrecht im nationalsozialistischen Staat unter besonderer Berücksichtigung der Rechtsprechung (1937) 20–21.

[10] For discussions of this problem in the Constitutional Committee of the National Assembly, see 2 Verhandlungen der Verfassunggebenden Deutschen Nationalversammlung (1920) 178–79, 368, 369. See also Brunet, The German Constitution (trans. from the French by Gollomb, 1923) 199–200; Oppenheimer, The Constitution of the German Republic (1923) 183–84; Kraus, The Crisis of German Democracy (1932) 99–100.

tional provisions making them subject to exception by ordinary legislation.[11] Moreover, the executive had power under article 48 of the Constitution to set aside certain fundamental rights provisions when "the public safety and order in the German Reich are seriously disturbed or endangered. . . ."[12]

A fourth element in the structure of the Weimar Constitution which stood in the way of effective judicial review was the failure to separate clearly the amending process from the ordinary legislative process. Article 76 provided for amendment of the Constitution "by way of legislation." The passage of such legislation required, however, a quorum of two thirds of the membership of the Reichstag and an affirmative vote of two thirds of those actually present. If, upon the submission of legislation amending the Constitution to the Reichsrat, a two-thirds majority of that body did not approve of the legislation and the Reichstag still insisted upon it, the Reichsrat could demand that the law be submitted to the people in a referendum. Approval in this referendum by a majority of those qualified to vote was then necessary for adoption of the legislation. Article 76 thus provided for an amending process which was, in many cases, distinguished from the ordinary legislative process only by the special majority required. It also failed to determine clearly whether legislation which was, in substance, a constitutional amendment could operate as such even though it did not indicate this quality on its face and failed to provide for an alteration of the text of the constitution. "Accidental" and "unpublicized" constitutional amendments occurred fairly frequently during the Weimar period and were, in general, considered to be constitutional.[13] Such practices made it difficult to consider that the Weimar Constitution embodied a law different in kind and importance from ordinary legislation.

Another obstacle to effective judicial review was inherent in the judicial structure established by the Weimar Constitution in which there were five federal supreme courts, the Reichsgericht, the Reichsfinanzhof, the Bundesamt für das Heimatswesen, the Reichsversorgungsgericht and the Staatsgerichtshof, each of which could determine finally all legal questions, including constitutional questions, coming before it. Disputes could, therefore, develop between the various German supreme courts

[11] See, *e.g.*, arts. 111, 112, 114, 115, 117 and 118 of the Weimar Constitution. See also Hensel, "Grundrechte und Rechtsprechung" in 1 Die Reichsgerichtspraxis im deutschen Rechtsleben (ed. by Schreiber, 1929) 1.

[12] See, for a discussion of the history of the use of article 48, Watkin, The Failure of Constitutional Emergency Powers Under the German Republic (1939) 15–24, 130–39.

[13] See Jacobi, "Reichsverfassungsänderung" in 1 Die Reichsgerichtspraxis im deutschen Rechtsleben (1929) 233, 260–77; Theisen, "Verfassung und Richter," 47 Archiv des Öffentlichen Rechts (1925) 257, 276–78; Triepel, *loc. cit. supra* n. 8, 542–43.

relative to the constitutionality of a particular piece of legislation and to the proper interpretation of constitutional provisions.[14] A bill to remedy this situation by providing for the transfer to the Staatsgerichtshof, for decision on constitutional questions, of cases involving legislation which a court considered unconstitutional was introduced into the Reichstag in 1926.[15] But the bill never became law.

One of the most fundamental and far-reaching decisions made by the drafters of the new German Constitution of 1949, the determination of the scope to be given judicial review where the constitutionality of federal legislation is involved, took into account the experience of the Weimar period with this general problem. The Basic Law seeks to provide institutions and procedures which will ensure effective judicial review,[16] thus summarizing and completing a revaluation of the traditional German position, formerly held by scholars and politicians alike, that constitutional protections for basic rights, implemented through judicial review, are undesirable. This revaluation, which, though it had already begun under Weimar, probably received its greatest impetus from the abuses of the legislative power which took place during the Nazi period,[17] has had many consequences in the post-war reorganization of the German political and constitutional structure. Land constitutional courts, with substantial powers of judicial review, are provided for in the constitutions of the Länder of Bayern, Württemberg-Baden, Hessen, Baden, Württemberg-Hohenzollern and Rheinpfalz.[18] Scholarly writing and political discussion have both begun to emphasize the contribution which judicial review can make to free, democratic government.[19] The Basic Law explicitly recognizes judicial review of the constitutionality of federal legislation, and the extent of the popular acceptance of this institution is reflected in the fact that only the communist party opposed the Law on the Constitutional

[14] See Blachly and Oatman, The Government and Administration of Germany (1928) 445–46.

[15] See Külz, "Die Prüfung der Verfassungsmässigkeit von Vorschriften des Reichsrechts," 31 Deutsche Juristen-Zeitung (1936) 837, 842–43.

[16] See Ipsen, "Grundgesetz und richterliche Prüfungszuständigkeit," 2 Deutsche Verwaltung (1949) 486.

[17] Cf. *id.* 486–87.

[18] See Neumann, "New Constitutions in Germany," 42 Am. Pol. Sc. Rev. (1948) 448, 463–65.

[19] A list of scholarly writings from the period 1945–1949 is given by Ipsen, *loc. cit. supra* n. 16, p. 486, n. 5. See also von Mangoldt, Das Bonner Grundgesetz (1950) comment 4 to art. 1, p. 45. But see Apelt, "Betrachtungen zum Bonner Grundgesetz," 2 Neue Juristische Wochenschrift (1949) 481, 482. Some political circles believed at the time of the drafting of the Basic Law that basic right provisions were unnecessary. The Social Democratic Party favored at that time, as a general principle, the adoption of a simple organization statute rather than a complete constitution.

Court in the Bundestag.[20] In the debate on this law, the prevailing thinking of the democratic parties was perhaps summarized by Neumayer when he expressed the hope that the "Constitutional Court will be a protector of the free democracy, a guardian of the Constitution, that its judges will discharge their function without the possibility of influence, in a nonpartisan way, free from fear and pressure of any sort."[21]

The Basic Law provides for two principal types of judicial review. Under article 93 (2) an action challenging the constitutionality of federal legislation can be brought by the Federal Government, by the government of a Land or by one third of the members of the Bundestag.[22] Article 100 makes provision for constitutional review of questions arising in ordinary litigation.[23] This article provides that when a court considers a law, the validity of which is pertinent to its decision, unconstitutional, it must stay the proceeding and refer the constitutional question to the

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[20] See 6 Verhandlungen des deutschen Bundestages (I. Wahlperiod 1949) 4419. This publication will be cited hereafter as Verhandlungen.

[21] See *id.* 4235.

[22] Article 93 provides as follows:

"(1) The Federal Constitutional Court decides:—
"1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal authority or of other parties concerned who have been endowed with independent rights by this Basic Law or by Rules of Procedure of a supreme federal authority;
"2. in case of differences of opinion or doubts on the formal and material compatibility of federal law or Land law with this Basic Law, or on the compatibility of Land law with other federal law, at the request of the Federal Government, of a Land Government or of one-third of the Bundestag members;
"3. in case of differences of opinion on the rights and duties of the Federation and the Länder, particularly in the execution of federal law by the Länder and in the exercise of federal supervision;
"4. on other disputes of public law between the Federation and the Länder, between different Länder or within a Land, unless recourse to another court exists;
"5. in the other cases provided for in this Basic Law.
"(2) The Federal Constitutional Court shall also act in such cases as are otherwise assigned to it by federal law."

[23] Article 100 provides as follows:

"(1) If a court considers unconstitutional a law, the validity of which is relevant to its decision, the proceedings are to be stayed, and a decision is to be obtained from the Land court competent for constitutional disputes if the matter concerns the violation of the Constitution of a Land, or from the Federal Constitutional Court if the matter concerns a violation of the Basic Law. This also applies if the matter concerns the violation of this Basic Law by Land law or the incompatibility or a Land law with a Federal law.
"(2) If, in the course of litigation, doubt exists whether a rule of public international law forms part of the federal law and whether it directly creates rights and duties for the individual (Article 25), the court has to obtain the decision of the Federal Constitutional Court.
"(3) If the constitutional court of a Land, in interpreting the Basic Law, intends to deviate from a decision of the Federal Constitutional Court or of the constitutional court of another Land, it must obtain the decision of the Federal Constitutional Court. If, in interpreting other federal law, it intends to deviate from the decision of the Supreme Federal Court or a higher federal court, it must obtain the decision of the Supreme Federal Court."

Constitutional Court for decision.[24] Sections 90 through 96 of the Law on the Constitutional Court add to the types of judicial review provided for in the Basic Law a procedure, the *Verfassungsbeschwerde*, by which a person can obtain a decision from the Constitutional Court on the question whether the public authority (*öffentliche Gewalt*) has infringed any of his basic constitutional rights or any rights guaranteed by articles 33, 38, 101, 103, and 104 of the Basic Law.

These provisions for judicial review are in harmony with the general structure of the Basic Law, which is much more favorable to the development of a tradition of judicial review than was the structure of the Weimar Constitution. For example, the basic rights provisions of the Basic Law have, in general, a precise legal content.[25] These rights are, moreover, declared by article 1 to be "binding on the legislature, on the executive and on the judiciary as directly valid law." Second, even where a basic right provision provides that the content of the basic right can be restricted by legislation, article 19 provides that "in no case may a basic right be infringed upon in its essential content."[26] There is, third, no constitutional provision, giving the executive broad emergency powers, analogous to article 48 of the Weimar Constitution. Article 81, which does give the executive emergency powers under certain circumstances, limits such a grant to a six months period and specifically provides that the Basic Law "may neither be amended nor wholly or partially repealed or suspended" through such emergency procedures. Fourth, the amending process is, as it was in the Weimar Constitution, not sharply distinguished from the ordinary legislative process. Article 79 provides that a law amending the constitution "requires the approval of two thirds of the Bundestag members and two thirds of the Bundesrat votes." However, "unconscious"

[24] It has been suggested that this institutional arrangement puts strong pressures on the regular courts to consider legislation constitutional as no court likes to see the judgment of another court substituted for its own. See Krüger, "Die Verfassung in der Zivilrechtsprechung," 2 Neue Juristische Wochenschrift (1949) 163, 165. It is interesting to note, in this connection, that the courts were beginning, even before the formation of the Bundesverfassungsgericht, to reserve decisions under article 100. See Ipsen, *loc. cit. supra*, n. 16, 492.

[25] Articles 6 and 7, which deal with marriage, the family, the school system, and religious education constitute partial exceptions. It should be noted that the drafters of the Basic Law avoided programmatic provisions where possible because of a desire to avoid a repetition of the difficulties to which such provisions had given rise under the Weimar Constitution. See von Mangoldt, "Grundrechte und Grundsatzfragen des Bonner Grundgesetzes," 75 Archiv des Öffentlichen Rechts (1949) 276–78.

[26] For a discussion of the important differences between the Basic Law and the Weimar Constitution in this respect see Krüger, "Die Einschränkung von Grundrechten nach dem Grundgesetz," [1950] Deutsches Verwaltungsblatt 625, especially 626. The determination of the "essential content" of basic rights provisions is left to the courts. See von Mangoldt, *loc. cit. supra* n. 19, comment 4 to art. 19, p. 120.

and "unpublicized" constitutional amendments are no longer possible under article 79, which provides that the Basic Law cannot be amended except "by a law expressly amending or amplifying the text" of the constitution. It is further provided in article 79 that no amendment can affect the basic principles contained in article 1[27] and article 20[28] of the Basic Law.[29] Finally, the possibility of conflicts between various courts on constitutional questions, which was inherent in the judicial structure established by the Weimar Constitution, is avoided by the Basic Law. Only the Constitutional Court can declare a law unconstitutional.[30] The possibility that a conflict could still develop under this arrangement if several German supreme courts[31] continued to consider the legislation in question constitutional, is avoided by section 31 (1) of the Law on the Constitutional Court, which provides that "The decisions of the Constitutional Court bind the constitutional organs of the Bund and of the Länder as well as all courts and officials."[32] It has further been suggested

[27] Article 1 provides as follows:

"(1) The dignity of man is inviolable. To respect and protect it is the duty of all state authority.
"(2) The German people therefore acknowledge inviolable and inalienable human rights to be the basis of every community, of peace and of justice in the world.
"(3) The following basic rights bind the legislature, the executive and the judiciary as immediately enforceable law."

[28] Article 20 provides as follows:

"(1) The Federal Republic of Germany is a democratic and social federal state.
"(2) All state authority emanates from the people. It is exercised by the people by means of elections and plebiscites and by separate legislative, executive and judicial agencies.
"(3) Legislation is subject to the constitutional order; the executive and the judiciary are bound by the law."

[29] The precise scope of this limitation is disputed. For a discussion of the problem see Ziedler, "Die Unverbrüchlichkeit der Grundrechte, [1950] Deutsches Verwaltungsblatt 598.

[30] See Basic Law, arts. 93 and 100.

[31] Some German jurists, impressed by the prestige and influence of the judiciary in the United States and in Great Britain, believed that a single supreme court for all legal matters, including constitutional questions, should have been established by the Basic Law. See, *e.g.*, Strauss, Die oberste Bundesgerichtsbarkeit (1949). This pamphlet publishes a memorandum prepared by Strauss and submitted to the Judicial Committee of the Parliamentary Council charged with drafting the Basic Law. *Id.* 5. The creation of the Bundesverfassungsgericht was a partial rejection of this approach. Article 95 of the Basic Law does provide for an Oberstes Bundesgericht "for the maintenance of the unity of federal law." This court has not yet been constituted.

[32] Bundesgesetzblatt 1951. I. 243, 246. This principle is new in German law, and the exact scope of the provision will have to be worked out by the courts. See Geiger, "Die Beziehungen zwischen der Bundesverfassungsgerichtsbarkeit und der übrigen Gerichtsbarkeit im Bunde auf Grund des Bundesverfassungsgerichtsgesetzes (B V G G)," 29 Deutsche Richterzeitung (1951) 172, 172–73. It is interesting to speculate whether this provision will be interpreted as making it impossible for the Constitutional Court to overrule its previous decisions.

that the fact that the Constitutional Court has its seat at Karlsruhe,[33] which is also the seat of the Bundesgericht, will contribute to the preservation of legal unity in constitutional matters.[34]

The Constitutional Court is thus the central institution in the experiment with constitutionalism initiated by the Basic Law—it is "the final step in building a state based upon the rule of law (*Rechtsstaat*)."[35] The Basic Law does not, however, regulate in detail the composition of the Constitutional Court and the status of its judges. Under article 97 the judges of the Constitutional Court, like all other German judges, are declared to be "independent and subject only to law."[36] This article further provides that judges "finally appointed on a full-time basis to established judgeships," as are the judges of the Constitutional Court, "may, against their will, be dismissed before the expiration of their term of office, or permanently or temporarily suspended from office or transferred to another position or placed on the retired list, only by the decision of a court and only on grounds and according to procedures provided for by law."[37] The only provisions in the Basic Law on the composition of the Court and the selection of its members are contained in article 94 which provides that "The Federal Constitutional Court consists of federal judges and other members. Half of the members of the Federal Constitutional Court are elected by the Bundestag and half by the Bundesrat. They may not belong to the Bundestag, the Bundesrat, the Federal Government or corresponding agencies of a Land." This article further provides that "the constitution and procedure" of the court are to be determined by a federal law.

The contemplated law, entitled *Gesetz über das Bundesverfassungsgericht*, was promulgated on March 12, 1951.[38] This law could, especially

[33] See Gesetz über den Sitz des Bundesverfassungsgerichts, Bundesgesetzblatt 1951. I. 288.

[34] See Weinkauff (President of the Bundesgerichtshof), "Grusswort für das Bundesverfassungsgericht," 29 Deutsche Richterzeitung (1951) 189.

[35] Remarks of von Merkatz (D P) in the debate on the Law on the Constitutional Court. See 6 Verhandlungen 4218; for a list of the main German political parties together with the abbreviations ordinarily used in referring to them see n. 78 *infra*.

[36] This is not perfectly clear from the text of article 94 of the Basic Law, which does not speak of "judges" but of "members" of the court. It is assumed, however, that the "members" of the court hold a judicial office. See Giese, Grundgesetz für die Bundesrepublik Deutschland (2nd ed. 1951) comment 2 to art. 94, p. 159. The same assumption is found in the Gesetz über das Bundesverfassungsgericht. Cf. §105 (the Constitutional Court can, in cases of incapacity or of certain types of dishonorable conduct, authorize the President of the Bund to remove a judge of the court).

[37] See also Basic Law, art. 98. For legislation authorizing the removal, under certain circumstances, of judges of the Bundesverfassungsgericht, see n. 36 *supra*.

[38] The debates in the Bundestag on this legislation are reported in 6 Verhandlungen 4218–36, 4287–03, 4412–19.

by creating a court staffed largely by nonprofessional judges serving short terms, have done much to render meaningless in practice the judicial review provisions of the Basic Law. Instead, all the democratic parties sponsored legislation designed to create a strong and independent court.[39]

The Law on the Constitutional Court establishes a court of two senates, each senate to be composed of twelve judges.[40] These judges must have completed their fortieth year and have either the education and training required for admission to the bar (*die Befähigung zum Richteramt*) or for the higher civil service (*die Befähigung zum höheren Verwaltungsdienst*).[41] The principle of professional judges was attacked by the representatives of the Communist Party in the Bundestag on the grounds that such judges would not be representative of the people.[42] Four judges in each senate are to be elected from among the judges of the various supreme courts.[43] These judges serve on the Constitutional Court for the duration of their judicial appointment,[44] which is for life, subject to provisions relative to retirement. The other eight judges in each senate are chosen for an eight year term, except that half of those chosen in the first election shall serve for a four year term.[45] The Communist attack upon this part of the law pointed out that such relatively long terms favor judicial independence.[46]

These judges are elected half by the Bundestag and half by the Bundesrat. The Bundestag elects by proportional representation a committee of twelve which is charged with selecting the judges to be chosen by the Bundestag. In this committee nine votes are required for election.[47] The Bundesrat elects the judges directly, a two-thirds majority being required.[48] These election procedures were adopted to encourage public

[39] The great constitutional importance of this legislation and the desirability of the Constitutional Court having the support of all the democratic parties were clearly recognized in the Bundestag. See, *e.g.*, the remarks of von Merkatz (D P), 6 Verhandlungen 4218; remarks of Arndt (SPD), *id.* 4413.

[40] §2.

[41] §3. In the German system the training required for a judicial career is the same as that required for admission to the bar.

[42] See remarks of Fisch (K P D), 6 Verhandlungen 4291, 4416. The Social Democrats, who had traditionally supported the idea of nonprofessional judges, had proposed in the committee discussions of the Law on the Constitutional Court that legal training not be required for members of the court who were not selected from among the regular judges. See remarks of von Merkatz (D P), *id.* 4222–23. The Social Democrats supported the committee draft upon the floor of the Bundestag.

[43] §4 (1).

[44] *Ibid.*

[45] §4 (2).

[46] See remarks of Fisch (K P D) 6 Verhandlungen 4291.

[47] §6.

[48] §7.

trust in the Court and to minimize the possibility of party considerations controlling the selection of judges.[49]

II. The Political Background

The two laws considered by the Constitutional Court in its decision of October 23, 1951 were enacted under article 118[50] of the Basic Law to carry out the territorial reorganization of the Länder of Baden, Württemberg-Baden, and Württemberg-Hohenzollern. General provisions for the territorial reorganization of the German Länder are contained in article 29 of the Basic Law.[51] Article 118 and article 29 are both expressions of the German desire to reorganize existing state governmental units, only three of which, Bayern, Hamburg, and Bremen, correspond to the former Länder,[52] into units which are soundly structured from the political, economic, and historical point of view.[53] Special provisions applicable to the territorial reorganization of Baden, Württemberg-Baden, and Württemberg-Hohenzollern were provided in article 118, because the partitioning of both Baden and Württemberg to conform with zonal arrangements between the American and French occupation authorities created conditions which "were considered especially artificial and it was desired to end the splitting up of two historic Länder such as Baden and Württemberg."[54] Because of this connection between the Zones of Occupation and the Länder, the British, French, and American Military Governors in their letter approving the Basic Law made a reservation

[49] See Arndt, "Das Bundesverfassungsgericht," [1951] Deutsches Verwaltungsblatt 297, 298.

[50] For the text of this article see n. 3, *supra*.

[51] For the text of this article see n. 3, *supra*.

[52] See "Rundschau," 5 Monatsschrift für deutsches Recht (1951) 659.

[53] Hitler abolished the Länder as governmental units but retained them as *Parteigaue*. See Lepawsky, Comment, "The Nazis Reform the Reich," 30 Am. Pol Sc. Rev. (1936) 324; Wells, Comment, "The Liquidation of the German Länder," *id.* 350; Krebs, Comment, "A Step Toward Reichsreform in Germany," 32 Am. Pol. Sc. Rev. (1938) 536; Boerner, Comment, "Towards Reichsreform—The Reichsgau," 33 Am. Pol. Sc. Rev. (1939) 853; Medicus, "Neugliederung der Länder," [1950] Deutsches Verwaltungsblatt 529. Because of the arrangements relative to Zones of Occupation and the desire to avoid German governmental and administrative units which did not lie wholly within one zone, the Länder organized after 1945 frequently did not correspond to the pre-Nazi Länder. See Marcus, "Ist Südschleswig ein zum Volksbegehren nach Art. 29 Abs. 2 des Grundgesetzes berechtigter Gebietsteil?" 76 Archiv des Öffentlichen Rechts (1950–51) 290–91; Neumann, *loc. cit. supra* n. 18, 448; von Mangoldt, *loc. cit. supra* n. 19, comment 2 to art. 29, p. 188. The whole problem of territorial reorganization has been the subject of considerable discussion in Western Germany. See Medicus, *id.* 529.

[54] Remarks of Seelos (B P) in the Bundestag debate on the Second Law on the Territorial Reorganization of the Länder Baden, Württemberg-Baden, and Württemberg-Hohenzollern, 6 Verhandlungen 4125.

relative to both articles 29 and 118, stating that "unless the High Commissioners should unanimously agree to change this position the powers set forth in these articles shall not be exercised and the boundaries of all of the Lænder excepting Wuerttemberg-Baden and Hohenzollern shall remain as now fixed until the time of the peace treaty."[55]

This reservation, although its effect upon article 118 is not entirely clear,[56] has not been considered by the Germans as presenting an obstacle to the territorial reorganization contemplated by that article.[57] In all events negotiations were begun, as contemplated by article 118, between the governments of Baden, Württemberg-Baden, and Württemberg-Hohenzollern with a view to agreeing among themselves upon a territorial reorganization. These negotiations finally broke down in November 1950.[58] In January 1951 two legislative proposals for territorial reorganizations of these Länder pursuant to article 118 were introduced into the Bundestag.[59] Both of these proposals contemplated a referendum in which the choice would be between consolidating the Länder into one Südweststaat and re-establishing the old Länder of Württemberg (including Hohenzollern) and Baden.[60] The proposals differed fundamentally, however, in the districts which they contemplated establishing for purposes of the referendum.[61] The supporters of a re-establishment of the historic Länder of Baden and Württemberg proposed that two districts, corresponding to old Baden and old Württemberg, be created for purposes of the referendum with a majority of the votes cast in each district required for formation of a Südweststaat. The proponents of a Südweststaat proposed the creation of four districts, Land Baden, the Landesbezirk Baden of Land Württemberg-Baden, the Land Württemberg-Hohenzollern, and the Landesbezirk Württemberg of Land Württemberg-Baden, with a majority of the votes cast in three of the four districts required for formation of a Südweststaat. The discussion of these proposals was predicated upon the assumption that districting arrangements would be decisive in

[55] See Letter of Approval of the Basic Law, May 12, 1949, para. 5.

[56] See von Mangoldt, *loc. cit. supra* n. 19, comment 1 to art. 29, p. 188; Maunz, "Rechtsfragen zur Neugliederung im Südwestraum," 4 Deutsche Rechtszeitschrift (1949) 532, 535; Jellinek, "Rechtsfragen zur Neugliederung im Südwestraum," *id.* 535, 536.

[57] This interpretation of the Letter of Approval was explicitly stated in the Bundestag debates on the Second Law on the Territorial Reorganization of the Länder Baden, Württemberg-Baden, and Württemberg-Hohenzollern by Müller, Staatspräsident of Württemberg-Hohenzollern, (7 Verhandlungen 5334) and by Hilbert (C D U) (*id.* 4119).

[58] See "Südweststaat-Frage und 'Blitzgesetz,'" 77 Archiv des Öffentlichen Rechts (1951) 96.

[59] See *ibid.*

[60] See *ibid.*

[61] See *ibid.*

determining the outcome of the contemplated referendum. A preliminary referendum conducted on September 24, 1950, had shown that, due to the very strong support in Land Baden for re-establishing the old Land Baden, the inhabitants of that area (now split into Land Baden and the Landesbezirk Baden of Land Württemberg-Baden) would vote against the establishment of a Südweststaat.[62]

The principal argument made by the supporters of a Südweststaat was that a healthy federation required the creation of economically strong Länder, which, it was asserted, the old Land Baden would not be under present day circumstances.[63] The supporters of the old Land Baden argued that it would be capable of supporting itself today[64] and also pointed to the traditions which had grown up around it in its one hundred and fifty year history.[65] There were also suggestions that the establishment of a Südweststaat would represent a step toward excessive centralization.[66]

Two lines of argument were directed against the districting proposals which would favor the establishment of a Südweststaat. They were said to be unconstitutional and undemocratic in that they contemplated merging the Land Baden, against the will of its inhabitants, into a new Südweststaat.[67] It was also argued that, under German law, the old Länder of Baden and Württemberg still existed and had, therefore, to be taken into account in setting up districts for the referendum.[68] The supporters of a Südweststaat met these lines of argument by, first, arguing that the presently existing Länder were recognized by the Basic Law and formed, therefore, a proper starting point for the establishment of referendum districts.[69] Land Württemberg-Baden was, it is true, divided into two districts, but this it was said only represented a concession to the supporters of old Baden.[70] It was pointed out that the proposed districts

[62] See remarks of Hilbert (C D U), 6 Verhandlungen 4119; remarks of Farke (D P), 7 *id.* 5308.

[63] See remarks of Mayer (F D P), 6 Verhandlungen 4124; remarks of Freudenberg (F D P), *id.* 4130; remarks of Gengler (C D U), *id.* 4490–91.

[64] See remarks of Hilbert (C D U), 6 Verhandlungen 4120–21; remarks of Hamacher (Z), *id.* 4133–34.

[65] See remarks of Wohleb (Staatspräsident of Baden), 7 Verhandlungen 5337–38.

[66] See remarks of Hamacher (Z), 6 Verhandlungen 4133.

[67] See remarks of Fink (B P), 7 Verhandlungen 5433; remarks of Jaeger (C S U), *id.* 5443. It should be noted that a proposal was made which would have had the effect of allowing the present Land Baden, if it so desired, to remain out of the Südweststaat. This proposal was rejected by Land Baden. See remarks of Erler (S P D), *id.* 5302.

[68] See remarks of Farke (D P), 7 Verhandlungen 5308; remarks of Kopf (C D U), *id.* 5324–25.

[69] See remarks of Erler (S P D), 7 Verhandlungen 5303; remarks of Schmid (S P D), *id.* 5329.

[70] See remarks of Schmid (S P D), 7 Verhandlungen 5328; remarks of Freudenberg (F D P) *id.* 5330–31.

made it impossible for the inhabitants of old Baden to be outvoted by the inhabitants of old Württemberg, as a Südweststaat could not be formed without the agreement of either North or South Baden.[71] An existing Land, it was further argued, can under articles 29 and 118 of the Basic Law constitutionally be reorganized against the will of its inhabitants.[72] It was also pointed out that Land Baden had rejected a proposal allowing it to remain out of a Südweststaat even in the event that the proposed territorial reorganization were accepted in the other three referendum districts.[73]

The supporters of a Südweststaat prevailed and the Bundestag passed on April 25, 1951, the Second Law (for the delay in legislating had made another law necessary) on the Territorial Reorganization of the Länder Baden, Württemberg-Baden, and Württemberg-Hohenzollern,[74] providing for the holding of a referendum before September 16, 1951, in four districts, the Land Baden, the Landesbezirk Baden of Land Württemberg-baden, the Land Württemberg-Hohenzollern, and the Landesbezirk Württemberg of Land Württemberg-Baden.

So much time was consumed in the legislative handling of the Second Law on the Territorial Reorganization of the Länder Baden, Württemberg-Baden, and Württemberg-Hohenzollern that it became apparent that a territorial reorganization could not be carried out before the April 1951 Landtag elections in Württemberg-Hohenzollern and in Baden. The governments of both Länder considered that new elections, when a territorial reorganization which would dissolve the existing legislatures was impending, were undesirable and a waste of public funds. Constitutional amendments to prolong the sessions of the existing Landtage were therefore prepared in both Länder for submission to the electorate.[75]

Upon further reflection, however, the governments of Württemberg-Hohenzollern and of Baden began to doubt, because of the expense, the probable small participation and the possible undesirability of so many closely spaced referendums,[76] the feasibility of dealing with this problem through amendment of the respective Land constitutions. The government of Württemberg-Baden also feared that the proposed constitutional amendment would be disapproved by the electorate.[77] The governments

[71] See remarks of Müller (Staatspräsident of Württemberg-Hohenzollern), 7 Verhandlungen 5336.

[72] See remarks of Schmid (S P D), 7 Verhandlungen 5330.

[73] See remarks of Erler (S P D), 7 Verhandlungen 5302.

[74] Bundesgesetzblatt 1951. I. 284.

[75] See "Südweststaat-Frage und 'Blitzgesetz,'" *loc. cit. supra* n. 58, 96–97.

[76] See the Justification of the First Law on the Territorial Reorganization of the Länder Baden, Württemberg-Baden and Württemberg-Hohenzollern, 6 Verhandlungen 4880.

[77] See "Südweststaat-Frage und 'Blitzgesetz,'" *loc. cit. supra* n. 58, 97.

of these two Länder decided, therefore, to request federal legislation extending the terms of their Landtage until the completion of the territorial reorganization. It was believed that this legislation could be constitutionally justified under article 118 (2) of the Basic Law as a preliminary step in the territorial reorganization contemplated by that article. A draft law to this effect was submitted to the Bundestag on March 15, 1951. The legislation was passed without discussion and almost unanimously after the required three readings had been completed in about three minutes.[78]

The legislation was next considered by the Bundesrat[79] where objections were raised, largely upon constitutional grounds. The Bundesrat decided, by a close vote, to demand that the legislation be submitted, pursuant to article 77 of the Basic Law, to a joint committee composed of members of the Bundestag and the Bundesrat.[80] After discussing the constitutional questions raised by the law this committee decided, by a vote of twelve to four, that the constitutional objections to the legislation could be avoided by entitling it "The First Law to Effect the Territorial Reorganization of the Three Länder of Baden, Württemberg-Baden, and Württemberg-Hohenzollern" and by limiting to March 31, 1952, the extension of the Landtage terms.[81]

The law as amended was reintroduced in the Bundestag on April 5, 1951. It was recognized in the debate that "expediency alone is not enough to make the law constitutional" and that the constitutionality of the law depended upon the interpretation to be given article 118 of the Basic Law.[82] The Minister of the Interior then announced to the Bundestag that the Cabinet, by a vote of six to five, considered the law unconstitutional even as revised.[83] In reaching this conclusion the Cabinet had considered three constitutional questions: could the national government interfere at all with the constitution of a Land; did article 118 of the Basic Law

[78] See, for the proceedings, 6 Verhandlungen 4836–37. The bill was supported by the following political parties: Christian Democratic Union (C D U), Christian Social Union (C S U), Social Democratic Party (S P D), Free Democratic Party (F D P), German Party (D P), Bavaria Party (B P), Economic Reconstruction Party (W A V); Association of Homeless and Disinherited- German Refuge Association (B H E-D G) and the Center Party (Z). The Communist Party (K P D), did not support the bill.

[79] The Bundesrat does not have extensive legislative powers, though it can compel the Bundestag to reconsider legislation. See Basic Law, arts. 76–78; Friedrich, "Rebuilding the German Constitution," II, 43 Am. Pol. Sc. Rev. (1949) 704, 713.

[80] See "Südweststaat-Frage und 'Blitzgesetz,'" *loc. cit. supra*, n. 58, 97.

[81] See Report of Joint Committee as presented to the Bundestag by Nevermann (Bürgermeister of Hamburg), 6 Verhandlungen 4949–50.

[82] See *ibid.*

[83] See statement of Lehr, 6 Verhandlungen 4950–52.

permit the carrying through in steps of the contemplated territorial reorganization; had the territorial reorganization already begun so that the conditions required for action by the federal government under article 118 were present.[84] No constitutional objection to the legislation was found by the Cabinet to exist in respect to the first two questions, but the majority considered that there was no basis for action by the federal government under article 118 because the territorial reorganization had not yet begun. The stand thus taken by the Cabinet was sharply criticized "as typical of the worst in our formalistic legal thinking; for it is a sign of such thinking to make fine distinctions which are not factually justified."[85] Renner, the Minister of Interior for Württemberg-Hohenzollern, argued that "One should in these things not proceed in such a legalistic fashion. . . ."[86] On April 5, 1951, the Bundestag adopted the revised law by a large majority.[87] The Bundesrat considered the amended law on April 6, 1951, and, in spite of a report from its legal committee to the effect that it still considered the law unconstitutional, approved the law by a vote of twenty-six to seventeen.[88] The two laws dealing with the territorial reorganization of the Länder Baden, Württemberg-Baden, and Württemberg-Hohenzollern were promulgated together on May 5, 1951.

III. The Decision of October 23, 1951

Land Baden began proceedings on May 25, 1951, before the Constitutional Court to have these two laws declared unconstitutional. The federal government, with which were associated Land Württemberg-Baden, Land Württemberg-Hohenzollern, and the Bundestag, argued that the laws were constitutional. The Constitutional Court ordered on September 9, 1951, that the contemplated referendum be postponed until after the decision in the case.[89] The decision was handed down on October 23, 1951, the court holding the first law unconstitutional and parts of the second law unconstitutional. This decision, the first final decision of the Constitutional Court,[90] is interesting both for the constitutional princi-

[84] See "Südweststaat-Frage und 'Blitzgesetz,'" *loc. cit. supra* n. 58, 98.

[85] Remarks of Euler (F D P), 6 Verhandlungen 4955.

[86] See 6 Verhandlungen 4953.

[87] See *id.* 4957.

[88] See "Südweststaat-Frage und 'Blitzgesetz,'" *loc. cit. supra* n. 58, 98.

[89] The referendum has now been held and the formation of a Südweststaat approved. See Jerusalem, "Das Urteil des Bundesverfassungsgerichts über den Südweststaat-Streit," 5 Neue Juristische Wochenschrift (1952) 45; N. Y. Times, March 1, 1952, p. 1, col. 4 and p. 5, col. 5.

[90] The Constitutional Court has handed down a number of interlocutory decisions or *Beschlüsse*, some before the decision of October 23, 1951. See 5 Neue Juristische Wochenschrift (1952) 20, 59–60; [1952] Juristenzeitung 29–31, 77–78.

ples which were invoked to hold federal legislation unconstitutional and for the general approach of the court to its task as constitutional arbiter.[91]

In determining the constitutionality of the first law, the court began by laying down as a principle of constitutional interpretation that an article of the Basic Law, in this case article 118, must be interpreted in the context of the whole constitution. The Basic Law embodies certain basic constitutional principles, the court reasoned, and particular articles are not to be interpreted in a way which would run counter to these principles. Two such fundamental principles of the Basic Law are, according to the court, the principles of democracy and of federalism.

The principle of democracy, although it does not prevent changes in election periods, does require, in the court's opinion, that these changes be made through constitutional procedures. This conclusion is reinforced by the specific provision of article 28 of the Basic Law, which guarantees to the people of each Land federal protection of the right to vote. The principle of federalism, recognized by articles 20, 28, and 30 of the Basic Law, ensures to each Land certain independent spheres of competence. One such sphere is the constitutional structure and organization of the Land government except insofar as the guarantees contained in article 28 come into play. The court concluded, therefore, that, so long as a Land continues to exist constitutionally, federal action to extend the terms of its Landtag violates the principles of democracy and federalism recognized by the Basic Law and is, as a consequence, unconstitutional.

The court also held that federal action under article 118 is limited by the provisions of article 72 of the Basic Law. In marking off the respective legislative competences of the federal government and of the Länder, the Basic Law recognizes an exclusive federal jurisdiction, provided for in article 73,[92] and a concurrent federal jurisdiction, provided for in article

[91] For German discussions of the decision see Jerusalem, *loc. cit. supra* n. 89; Ule, "Anmerkung," [1952] Deutsches Verwaltungsblatt 17–18.

[92] This article provides as follows:

"The Federation has the exclusive power to legislate on:—
"1. foreign affairs;
"2. citizenship in the Federation;
"3. freedom of movement, passports, immigration and emigration, and extradition;
"4. currency, money and coinage, weights and measures, as well as computation and time;
"5. the unity of the territory as regards customs and commerce, commercial and navigation agreements, the freedom of traffic in goods, and the exchanges of goods and payments with foreign countries, including customs and frontier control;
"6. federal railroads and air traffic;
"7. postal and telecommunication services;
"8. the legal status of persons employed by the Federation and by the corporate bodies of federal public law;
"9. industrial property rights, copyrights and publication rights;
"10. cooperation of the Federation and the Länder in matters of criminal police and of protection of the constitution, establishment of a federal office of the criminal police, as well as international prevention of crime;
"11. statistics for federal purposes."

74.[93] Article 72 gives the Länder power to legislate in the field of concurrent jurisdiction until such time as the federal government exercises its legislative power. This article further provides that the federal government cannot legislate in the field of concurrent jurisdiction unless a need for regulation by federal law exists because "(1) a matter cannot be effectively regulated by the legislation of individual Länder, or (2) the regulation of a matter by a Land law might prejudice the interests of other Länder or of the community at large, or (3) the preservation of legal or economic unity demands it, in particular the preservation of uniformity of living conditions beyond the territory of the individual Land." The Constitutional Court concluded that the federal legislation involved in the instant case was an unconstitutional exercise of the concurrent jurisdiction because the problem could have been dealt with by the Länder.[94]

The court went on to deal with the practical consequences of holding

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[93] This article provides as follows:

"Concurrent legislative powers extend to the following matters:—
"1. civil law, criminal law and execution of sentences, the constitution of the courts, the procedure of the courts, the legal profession, notaries and legal advice (Rechtsberatung);
"2. registration of births, deaths, and marriages;
"3. the law of association and assembly;
"4. the law relating to the transient and permanent admission of aliens;
"5. the protection of German cultural treasures against removal abroad;
"6. the affairs of refugees and expellees;
"7. public relief;
"8. citizenship in the Länder;
"9. war damage and reparation;
"10. benefits to war disabled persons and to dependents of those killed in the war, assistance of former prisoners of war, and care of war graves;
"11. the law relating to economic matters (mining, industry, supply of power, crafts, trades, commerce, banking and stock exchanges, private insurance);
"12. labor law, including labor relations, protection of workers, employment exchanges and agencies, as well as social insurance, including unemployment insurance;
"13. the promotion of scientific research;
"14. the law regarding expropriation, to the extent that matters enumerated in Articles 73 and 74 are concerned;
"15. transfer of land, natural resources and means of production into public ownership or other forms of publicly controlled economy;
"16. prevention of the abuse of economic power;
"17. promotion of agricultural and forest production, safeguarding of the supply of food, the import and export of agricultural and forest products, deep sea and coastal fishing, and preservation of the coasts;
"18. dealings in real estate, land law and matters concerning agricultural leases, housing, settlements and homesteads;
"19. measures against epidemic and infectious diseases of humans and animals, admission to medical and other professions and practices in the field of healing, traffic in drugs, medicines, narcotics and poisons;
"20. protection with regard to traffic in food and stimulants as well as in necessities of life, in fodder, in agricultural and forest seeds and seedlings, and protection of trees and plants against diseases and pests;
"21. ocean and coastal shipping as well as aids to navigation, inland shipping, meteorological services, sea waterways and inland waterways used for general traffic;
"22. road traffic, motor transport, and construction and maintenance of long distance highways;
"23. railroads other than federal railroads, except mountain railroads."

[94] This argument is criticized in Jerusalem, *loc. cit. supra* n. 89, 48.

the first law on territorial reorganization unconstitutional. Because the Landtage of the two Länder relied upon a situation created by a federal law the court declared, in the interest of legal security, that the actions taken by the Landtage up to the handing down of its decision are valid. The court then noted that it would be impossible for the Länder of Baden and of Württemberg-Hohenzollern to deal through constitutional amendment with the problems created by holding the first law unconstitutional because the amending process required, under the constitutions of both Länder, action by the Landtag. New elections could be held in Baden under the Baden election law, but as the court pointed out, a special problem is presented in Württemberg-Hohenzollern where the Occupation Authorities suspended the election law passed by the Landtag.

The Constitutional Court then held the principal provisions of the second law constitutional and provided in its judgment that the referendum, which the court had ordered postponed to await the decision of the case, could be held at any time before December 16, 1951. The court first considered whether the question contemplated for the referendum is one within the discretion given to the federal legislature under article 118. A voter could, in effect, vote for or against a Südweststaat, a vote against a Südweststaat being necessarily a vote for the re-establishment of the old Länder of Baden and of Württemberg. The question whether the present Länder should be continued is, therefore, not put before the voters but had already been decided by the Bundestag. The court was troubled by this way of putting the question of territorial reorganization but concluded that, in view of the undoubted public sentiment in favor of the restoration of the old Länder in the event a Südweststaat was rejected and of the great difficulties faced in carrying out the territorial reorganization contemplated by article 118, the legislature did not abuse the discretion given it by that article in deciding that a referendum is not needed upon the question whether the existing Länder should be continued.

The court next considered the question which had been argued at some length in the Bundestag debates on the second law, whether it was constitutional to provide that majority votes in three of the four referendum districts would suffice for the establishment of a Südweststaat for the whole area. The court first pointed out that, although the federal principle is fundamental in the Basic Law, articles 29 and 118 provide for territorial reorganizations in which existing Länder may lose their independent existence even against the will of their inhabitants. For such territorial reorganizations article 29 requires not only a federal law but also a national referendum. However, after looking to the legislative history of article 118 and considering the practical problem with which that article

was intended to deal, the Constitutional Court concluded that this requirement of article 29 cannot be read into article 118. It is, therefore, proper to restrict the referendum on the Südweststaat question to the Länder directly involved in the proposed territorial reorganization.

The Land Baden placed particular emphasis upon two arguments: first, these provisions of the second law violate the democratic principle fundamental to the Basic Law and, second, the old Länder of Baden and of Württemberg still have legal existence and a legal claim to being restored. The court pointed out with reference to these arguments that articles 29 and 118 expressly limit the democratic principle in certain situations, including the present one, and that the present Länder had been recognized by the Basic Law so that the old Länder of Baden and of Württemberg no longer have either legal existence or a legal claim to restoration.

A final argument against these provisions of the Second Law was based upon the principle of equality before the law recognized by articles 3 and 19 of the Basic Law. The contention was that, by providing for the merging of the present Land Baden into a Südweststaat by majority votes in three of the four referendum districts, the Länder of Baden, Württemberg-Baden, and Württemberg-Hohenzollern are given less favorable treatment than that accorded the other Länder by article 29. The court did not content itself with the short answer to this proposition, that article 118 provides special procedures for the territorial reorganization of these three Länder, but went on to lay down the principle that equality before the law is satisfied when the classifications and provisions of the legislation in question are not arbitrary but are reasonable in view of the particular problem with which the legislator was dealing.[95] The special problems, and the particular need, of territorial reorganization of these Länder justify, in the court's view, the special provisions contained in the second law. The argument was also made that the principle of equality is violated by creating referendum districts which assure the approval of a Südweststaat. The court considered this argument and indicated that it might prevail if the districts had been drawn so as to make the referendum a mere sham. This was not, however, proved to the court's satisfaction.

Two provisions of the Second Law were held unconstitutional. Section

[95] This analysis of the principle of equality before the law is rejected in Jerusalem, *loc. cit. supra* n. 89, 47–48. It had been advanced by Leibholz, now a judge on the Constitutional Court, in "Die Gleichheit vor dem Gesetz und das Bonner Grundgesetz," [1951] Deutsches Verwaltungsblatt 193. See also Thoma, "Ungleichheit und Gleichheit im Bonner Grundgesetz," *id.* 457.

27 of the law gives the Minister of the Interior authority "to issue such decrees having the force of law as are required" to implement the provisions of the law. This was held an excessive delegation of powers under article 80 of the Basic Law which provides that legislative delegations of authority to issue decrees having the force of law must specify in the law "the contents, purpose, and scope of such powers." The court reasoned that this delegation is not sufficiently definite in that it fails to determine the limits within which the Minister of the Interior can act.[96] Section 14 (5) of the Second Law, which provides that the constitutional assembly for a Südweststaat shall serve as its first Landtag, was also held unconstitutional on the ground that the only limits which can be imposed upon the powers of a constitutional assembly are those contained in article 28 of the Basic Law. Certain provisions of other sections of the Second Law, such as section 15, which gives various rights in the constitutional assembly to the governments of the Länder Baden, Württemberg-Baden, and Württemberg-Hohenzollern, are, the court further held, valid only on the assumption that they do not bind that assembly.

The approach of the Constitutional Court, as seen in its first decision, to its task as constitutional arbiter offers perhaps an insight into the future of judicial review in Germany. The language and reasoning of the decision suggest that the court is consciously setting about to demonstrate its authority and to provide the judicial ingredients needed for the development of a tradition of judicial review.[97] In its consideration of the constitutionality of the first law, the court did not limit itself to a discussion of whether the territorial reorganization contemplated by article 118 of the Basic Law had begun so that federal action was authorized by that article. Instead, the court used the first law as a jumping off point for a discussion of two basic constitutional principles—democracy and federalism. In this the court's decision may suggest to the student of American constitutional law a certain parallelism with the approach and tone of Marshall's decision in *Marbury v. Madison*.[98] The same approach is seen at some points in the discussion of the Second Law; for example, the court considered

[96] This application of article 80 has apparently received general approval. See Schneider, "Die Übertragung rechtsetzender Gewalt im Rechtsstaat," [1952] Juristenzeitung 92.

[97] "[T]he decision itself lacks in many respects the reserve which keeps an experienced judge from saying more than is absolutely necessary for the decision of the concrete case before him. This is especially true . . . [in the case of the remarks relative to the possible unconstitutionality of constitutional provisions] . . .. This was for the decision of this dispute in no way necessary. . . . One cannot, therefore, help but think that the Constitutional Court wanted to take a position here and to create a precedent for future cases. . . ." Ule, *loc. cit. supra* n. 91, 17–18.

[98] 1 Cranch (U. S. 1803) 137.

at length the meaning of equality before the law even though a decision upon the question presented could have been reached without reference to articles 3 and 19 of the Basic Law. The general tone of the language used by the court, as well as the symbolism of holding a federal law unconstitutional in its first decision, would both seem to indicate that the Constitutional Court is determined to accept the constitutional responsibilities which the Basic Law now expressly places, for the first time in German history, in the hands of a court.

Some of the difficulties which still have to be overcome in the course of the developing of a tradition of judicial review are suggested by the German discussions of the question whether, and to what extent, the decisions of the Constitutional Court will be political. This was discussed at some length in the committee report on the draft of the Law on the Constitutional Court where it was said that the court will not make "political decisions in juridical clothes" because its function "is to discover what has already been decided in the Basic Law by the will of the drafters and to give this concrete application. . . . The Constitutional Court makes, as a true court, . . . legal decisions, that is to say it recognizes what has already been decided."[99] However, even if it be generally accepted that the court reaches its decisions through reasoning processes which can be accurately thus described, German writers clearly recognize that the decisions so reached will often have very important political repercussions,[100] and parallels are drawn in this connection between the Constitutional Court and the United States Supreme Court.[101] Many German writers today probably agree, in spite of their recognition that certain of the court's decisions will have great political importance, that "In the long run the right of judicial review, when held within the boundaries which are naturally given for it, has through its controlling and, when necessary, correcting function a thoroughly beneficial and healthy effect on the legislature and on the bureaucracy."[102] A substantial body of opinion, however, fears that the Constitutional Court will interfere with political development and decisions.[103]

[99] Remarks of von Merkatz (D P), 6 Verhandlungen 4218–19; see also remarks of Laforet (C S U), *id.* 4288; remarks of Fisch (K P D) *id.* 4416.

[100] See Arndt, *loc. cit. supra* n. 49, 297; Weinkauff, *loc. cit. supra* n. 34, 190; Ipsen, *loc. cit. supra* n. 16, 492; Römer, "Zur Rechtsprechung des Bayerischen Verfassungsgerichtshofs," 4 Süddeutsche Juristen-Zeitung (1949) 24, 27–28.

[101] See, *e.g.*, Leibholz (now a judge on the Constitutional Court), *loc. cit. supra* n. 95, 199; Weinkauff, *loc. cit. supra* n. 34, 190.

[102] Leibholz (now a judge on the Constitutional Court), *loc. cit. supra* n. 95, 200.

[103] See, *e.g.*, Apelt, "Erstreckt sich das richterliche Prüfungsrecht auf Verfassungsnormen?" 5 Neue Juristische Wochenschrift (1952) 1; Thoma, *loc. cit. supra* n. 95, 457; *cf.* Maunz, Deutsches Staatsrecht (1951) 156–63.

Even the supporters of the court show a desire to de-emphasize its actual power by their tendency to describe the judicial function in terms of a noncreative law-finding process. Although this description, as applied to the judicial process in general, was current in Germany in the first years of this century, it has now been given up in favor of descriptions and theories which recognize that the courts play a creative role in the development of law.[104] For example, the jurisprudence of interests has achieved such widespread acceptance that the highest regular civil court, the Bundesgericht, was, on the occasion of its opening, enjoined to interpret the Civil Code by analyzing the competing interests present in each case,[105] and the canons of statutory interpretation today generally accepted in Germany permit the courts to interpret codes and statutes in terms of the intent which the legislator would have if he were legislating at the present time with knowledge of contemporary conditions.[106] The desire of the supporters of the court to de-emphasize the discretionary power which the individual judges of the Constitutional Court will wield may also have been an element in the decision not to permit dissenting opinions on the court. Dissenting opinions have not been traditionally, and are not today, permitted on the regular German courts. It was, however, recognized in the debates on the Law on the Constitutional Court that dissenting opinions could assist materially in the development of a body of constitutional law.[107] Nonetheless, there was general agreement that "The trust in justice and especially in constitutional justice is not sufficiently developed with us to preclude the possibility in litigation with political aspects that public reactions, at once unpleasant and dangerous for the entire institution as such, may result if, in litigation involving political issues, a judge himself asserted that it would have been possible to decide otherwise."[108]

Judicial review cannot, in the long run, operate effectively unless there is general popular acceptance of, or at least acquiescence in, the proposition that certain possibilities of abuse inherent in the legislative process require[109] checking by another process, the judicial process, which con-

[104] See von Mehren, Book Review, 63 Harv. L. Rev. (1949) 372.

[105] See Reinicke, "Die Auslegungsgrundsätze des Bundesgerichtshofes," 4 Neue Juristische Wochenschrift (1951) 681. An excellent collection of readings on this theory is contained in The Jurisprudence of Interests (ed. and transl. by Schoch, 1948).

[106] See 1 Staudinger, Kommentar zum Bürgerlichen Gesetzbuch (10th ed. 1936) 31; *cf.* Swiss Civil Code, art. 1.

[107] See remarks of Laforet (C S U), 6 Verhandlungen 4288.

[108] Remarks of Wahl (C D U), 6 Verhandlungen 4224–25.

[109] It is clear that the legislative process does not enjoy the same respect today in Germany that it had in the nineteenth century. *Cf.* von Mangoldt, *loc. cit. supra* n. 19, comment 4 to art. 1, p. 45. Some writers believe, however, that "as so often in the development of German public law, the pendulum has begun to swing too far in the other direction." Apelt, *loc. cit. supra* n. 103, 2.

tains safeguards against these abuses. The development of traditions and loyalties which embody and carry forward this popular acceptance will depend, in part, upon the skill, insight, and determination shown by the Constitutional Court. But probably still more important will be the whole political and social evolution of Germany. Unfortunately, Western Germany faces a period of history in which political passions are likely to run high and a spirit of objectivity, restraint, and cooperation may well prove to be difficult to achieve and to preserve. In such a political climate the Constitutional Court is likely to be strongly supported by particular political groupings, but the court may find it rather more difficult to obtain acceptance and support in the community as a whole. Some of the matters made subject to the jurisdiction of the court will also tend to draw it directly into the storm-center of political disputes. For example, article 21 gives the Constitutional Court the power to declare political parties unconstitutional "which, according to their aims or the conduct of their members, seek to impair or abolish the free democratic basic order or to jeopardize the existence of the Federal Republic of Germany."[110] Under article 18 the Constitutional Court has authority to order the forfeiture of certain constitutional rights, such as freedom of the press, freedom of assembly, and the right of property, on the part of those who use these rights to attack the free, democratic, basic order. Section 97 of the Law on the Constitutional Court gives the Bundestag, the Bundesrat, and the Bundesregierung the right to ask the court for advisory opinions on constitutional matters. A court is, perhaps, less likely to become the object of political attack if it is only asked to pass upon the constitutionality of legislative action restricting the rights of political parties or individuals whose behavior tends to subvert the constitutional order, and if it only deals with constitutional problems in the precise and limiting context of a concrete case.[111] In both these respects the German Constitutional Court occupies a more exposed political position than does the Supreme Court of the United States.[112] These considerations, together with the emphasis

[110] For a discussion of the meaning of "free democratic basic order," see Leibholz (now a judge on the Constitutional Court), "Der Begriff der freiheitlichen demokratischen Grundordnung und das Bonner Grundgesetz," [1951] Deutsches Verwaltungsblatt 554.

[111] At the present time both the constitutionality of the Communist and Neo-Nazi parties and of German rearmament without a constitutional amendment are before the Constitutional Court. See N. Y. Times, Feb. 1, 1952, p. 6, col. 8; *id.* Feb. 8, 1952, p. 1, col. 5 and p. 6, col. 3. The political importance and difficulty of these questions is obvious. Cf. Loewenstein, "Der Kommunismus und die amerikanische Verfassung," [1952] Juristenzeitung 2, 9–10.

[112] Legislative action affecting the operations of the Communist Party was recently considered by the United States Supreme Court in *Dennis et al v. United States*, 341 U. S. 494 (1950). In his concurring opinion Justice Frankfurter described the role of the Court as follows: "Primary responsibility for adjusting the interests which compete in the situation

which still tends to persist in German legal thinking upon the conception of law as a legislative process and the lack of a long and conscious tradition of creative judicial activity, militate against an easy and deep-going acceptance in Germany of the principle and philosophy of judicial review.

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before us of necessity belongs to the Congress. . . . We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it." *Id.* 525.

The principle that the United States Supreme Court will not give advisory opinions was established as early as 1793 when the Court refused to advise with respect to questions which President Washington put to it in connection with certain treaties between the United States and France. See Thayer, Cases on Constitutional Law (1894) 176; Marshall, Life of Washington (1807) 441–42.

MAX RHEINSTEIN

Teaching Tools in Comparative Law

A Book Survey

SEVERAL BOOKS ENTITLED COMPARATIVE LAW or the like have appeared on the scene in recent years. Even though recentness does not mean that they have been published within the last few months, a review will not be out of place in the first issue of our new American Journal of Comparative Law. All these books are meant to serve purposes, primarily, or among others, of academic instruction. However, if we try to appraise them, we find ourselves confronted with a difficulty. If one is to review a case book or a text on, let us say, the law of contracts or family law, the question is simply to find how well the book serves the purposes of instruction in that particular field of the law. We pretty well know what we mean by the law of contracts or family law, and instruction in these fields means that we are trying to familiarize the students with the basic institutions, the principles, the important rules and the methods of that field. But what is comparative law and how can it be taught? After two decades of activity as a teacher of comparative law and as the occupant of a chair of comparative law I have to confess that I am still puzzled by these questions, and perhaps the only statement which one can make with certainty is that comparative law is not a field of law on a par with contracts, family law, decedents' estates, or conflict of laws. But, then, what is it?

Perhaps we can find some answer when we look to other branches of learning in the names of which we find the adjective "comparative," such as comparative religion or comparative linguistics. Both are fairly young sciences, and, as we may observe here, both have proved themselves to be peculiarly fascinating and fruitful. For centuries grammarians have studied the grammar, structure, vocabulary, and history of this or that particular language, especially Latin, Greek, Hebrew, Arabic, and the modern languages of the Western world. Comparative linguistics arose when "exotic" languages, such as those of the East, the American Indians, or the natives of Africa or Oceania, were made the subject of scientific study and when, under the impetus of acquaintance with the seemingly

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totally different, philologists came to search for the common features and were then driven to such problems as those of the origin and growth of language in general or its role in human society. It was then discovered that languages could be grouped in families, that languages change and that their changes can be related to certain changes in the development and living conditions of the people in question, that one could find certain structural laws, etc. In other words, in addition to the scholarly investigation of particular languages there developed a new science of language in general, which in many ways came to throw new light upon the structure, the history, and the function of all the several languages including our own.

Similarly, comparative religion was built up alongside of and above the long established theologies of Christianity, Catholic and Protestant, of Judaism, Islam, Hinduism, and Buddhism, paying attention to the less developed religions of antiquity and of more primitive or archaic civilizations, and trying to investigate and define the phenomenon "religion" as such, its general role in human life, its types, structures, development, relations to other phenomena, etc.

Along similar lines, there has begun to be developed a science of law as such, which is as different from the various legal sciences of the lawyers as comparative religion is from Catholic, Protestant, Jewish, Islamic, or any other theology. What the, let us say, Islamic theologian is trying to do is to collect those propositions which are regarded as the divine revelations of truth, i.e., in his case, primarily the propositions of the Koran and the Sunna, and to form out of them a comprehensive system in which coherent answers can be found to all questions of ontology, cosmology, ethics, politics, ritual, in short to all questions of a theoretical and practical nature to which the faithful yearns to know the "true" answer. In building up this comprehensive system of his cosmos the theologian may try to supplement the revealed truth by human experience and to reconcile it with human reason, but his frame of reference is constituted by the propositions of *his* religion as he finds them in *its* sacred writings and in *its* sacred traditions.

Legal science in the traditional sense constitutes a close parallel. As long as Roman law was treated not as a subject of historical research but as a valid system of law of, for instance, 13th century Italy or 19th century Germany, the task of its scholars was to collect its authoritative texts, including their interpretations, to reconcile them with each other, to arrange them in a comprehensive, well-structured system in which the properly trained adept would find the answers to every conceivable problem of judicial controversy. Exactly the same has been the task of the expounders

and scholars of the Common Law, however different their methods may sometimes have been from those of the Romanists. Ever since the days of Glanville writers and teachers of the Common Law have collected the precedents, the statutes, and its other authoritative materials, have "interpreted" them and arranged them so that they can be found whenever the need arises, and have developed methods by which they can be made to yield answers to novel questions or can be adapted to changing needs. Clearly, this sketchy characterization of the legal science of the Common Law is oversimplified, but it indicates that one feature which counts for our purposes, viz. that in his search for answers to his problem the scholar, like the practitioner, of the Common Law confines himself to the sources of the Common Law, which he has to treat as a self-contained system, without regard to what other sources may be authoritative for the scholar or practitioner of French, German, Islamic, or Uruguayan law. There are thus in the world as many sciences of positive law as there are systems. There is a science of French, of German, or Japanese law, and in our own bailiwick we find that the once common learning of the Common Law is breaking up into separate bodies of learning about American and English, and perhaps, even of Illinois, Michigan, and Virgin Islands law. What matters in our context is that every one of these bodies of learning of positive law is nationally limited, even if we take into account that in the positive law of some countries legal thought developed in others may figure among the authoritative or persuasive sources. In this country we still pay some attention to English cases, books, or articles, and a Mexican lawyer will frequently look to the legal thought of Spain, France, or other countries whose legal systems are similar to that of his own. But if we in this country look to writings from other Common Law countries, we do it to derive from them enlightenment as to our own, American, law, in which alone we are interested as practitioners or scholars of positive law.

However, in addition to our being lawyers we are human beings with curiosity and the urge for knowing and understanding the world in which we live, and in that capacity we may well come to ask questions about this phenomenon "law" as such, especially when we find out that abroad law is not the same as here, or that in the past it has not been the same as it is today. Why is it different; why does the law change with changing times; what makes it change; why is it now the way it is; what is this thing "law" in general; what is its role and function in society; can we evaluate it, in general and as to its particular manifestations; is there "good" and "bad" law; what is the standard for such value judgments?

These, or at least some of these, questions have been asked for centuries.

They seem to correspond to those questions which are asked in comparative linguistics or comparative religion, but it has not been traditional to speak of comparative law when we try to formulate and to answer them. They are rather regarded as forming the sphere of philosophy of law or of "jurisprudence" in that vague sense in which this word is used in English-speaking countries. Indeed, the way of attempted solution has traditionally been that of philosophy, i.e. of speculation in the sense of concluding, through the use of reason, from the observable and known to the unknown, or through deriving answers to specific problems by conclusions from first principles. This is not the place for a critical evaluation of the role and merits of legal philosophy. It will suffice to state that we are driven to it by an irresistible urge to know and understand the mysterious universe in which we find ourselves and, confiding in the cherished gift of reason, to find answers of at least subjective certainty to questions on which we have to take a stand if we are to live, however insoluble they may be to the finite human mind. This endeavor, through the mind, to find the answers to those ultimate questions which arise in connection with law, finds a parallel in similar endeavors in relation to the phenomena of language and religion, where we also speak of philosophy when we try, through reason or through systematized intuition or mystic vision, to comprehend the "essence" or "nature" of language or religion or their ultimate origins, ends, and functions in the cosmic order.

Those sciences to which we refer as comparative linguistics or comparative religion have more limited aims and different methods. They collect and observe the phenomena which are accessible to observation, analyse and classify them, and attempt, upon the basis of such observation and never going beyond it, to find out what generalizing statements there can be made. They refrain or, at least, ought to refrain, from speculation, and they aim at being exact sciences, similar to the natural sciences. That they cannot reach that aim, is determined by the complexity of their phenomena which can rarely, if ever, be separated from each other with the exactitude of the phenomena of nature. Even among the natural sciences we find different degrees of exactness. It is easier for the physicist to isolate the phenomena which he tries to observe than it is for the physiologist, and it is much more difficult for the social scientist, within whose realm, in the broadest sense, we have to place the sciences of comparative linguistics or comparative religion. To that same realm also belongs the science of comparative law when its cultivator tries to observe, describe, classify, and investigate in their relations among themselves and to other phenomena, the phenomena of law. Comparative law in that sense is the observational and exactitude-seeking science of law in general. Its subject matter is constituted by the laws of all times and climes. Refraining from

speculation it endeavors to collect, observe, analyse, and classify them, and, like other sciences in the narrower sense of the word, it searches for typical collocations, coincidences, and sequences, or, in other words, for "laws;" laws, of course not in the sense of statutes, precedents, or other ought-norms of human behavior, but laws in the sense in which the word is used in the "sciences", laws of the kind of Newton's laws of gravitation or Gresham's law in economics; laws, as it may also be appropriate to observe, not in the sense of immutable intrinsic necessities, but in that sense in which the word is understood in modern natural science, i.e. simply as coincidences or sequences which observation reveals as typically occurring under certain conditions.

Endeavor of this kind has been carried on for many centuries. It was the endeavor of Aristotle when he investigated into the constitutions of the Greek cities, or of Montesquieu when he probed into the relations between legal, political, racial, climatological, and other phenomena. It has become intensified in more recent times, but more commonly under the name of sociology of law than comparative law. Yet, there is no reason why we should not use that term, unless we wish to reserve it for a different kind of endeavor of which we shall speak shortly and which consists primarily in the observation of the current positive laws of modern foreign nations and the comparison of their rules, their machinery, and their methods with those of our own country. To me, at least, it seems that comparative law in this more positivistic sense inevitably guides, or drives, us to the more general endeavor of comparative law in the sense of sociology of law, as we have just tried to define it. I have thus felt it ineluctable in my own academic teaching of comparative law, after starting out with comparing modern Civil Law with modern American law, to include comparative law in the sense of sociology of law.

Clearly, the course so entitled could be no more than an experiment. The field is immense and hardly developed. The mass of phenomena is so staggering that no one can ever hope to master even a major fraction. The literature is sparse, at least the number of books in which attempts are made at systematic treatment. There is nowhere an established pattern which one could follow. Yet, all these aspects combine to make the task all the more challenging.

The seminar courses which we have offered in sociology of law at the University of Chicago Law School have been of a twofold kind. In connection with current work of translating and annotating the Part on Sociology of Law in Max Weber's monumental treatise of sociology,[1] we have several

[1] Wirtschaft und Gesellschaft (Grundriss der Sozialökonomik. 3. Abteilung. 2 ed. 1925) 2 vols. The English translated and annotated edition is to be published as a part of the Association of American Law Schools' Twentieth Century Legal Philosophy Series. The pub-

times offered a seminar on Max Weber's sociology of law, in which we have read and discussed the text which will shortly be available on the book market. This short text ranges over a vast field. Weber's knowledge is truly phenomenal. He literally draws on the laws of all times and climes, on modern Civil and Common Law, on Roman, Greek, and Germanic laws as well as on the laws of Islam, on Hindu or Chinese law, or on the laws of primitive tribes. All this vast material is centered, however, around one basic problem, which constitutes the unifying theme of the entire book with its chapters on the sociology of power, of political, administrative, and economic organization, and even of music. Is it true, as the Marxists maintain, that all social phenomena are determined by economic facts, especially the relations of production? Or can it perhaps be said, as some have believed in answering the Marxists, that religious phenomena are the determinants of all others? Is it possible and permissible at all to search for any one sphere of social life as determinative of all others? Or do we have to recognize a more subtle and more complex interplay of all social phenomena among each other? Having, at an earlier date, investigated the interplay between religious and economic phenomena, Weber, in his magnum opus, undertakes, among other things, to search for the interplay between legal phenomena on the one hand, and economic, religious, political, and administrative on the other. Perhaps, the central thesis of his sociology of law is constituted by the section on the types of law specialists by whom the legal system of a given society is cultivated or dominated. Wherever a legal system has been manipulated by priests or theologians it presents certain characteristic features, which are significantly different from a law practiced by tribal assemblies of one or another type, or a law dominated by gentlemen of leisure as in Rome, or a squirearchy as in 18th century England, or conveyancing counsellors, or the bureaucratic officialdom of continental monarchies, or scholars of the type of the 19th century German Pandectists, etc. In constant relation with his central theme, Weber discusses such problems as the

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lished volumes of this series, all of which should be of interest to the student of comparative law are:

H. Kelsen, General Theory of Law and State; transl. by A. Wedberg (1945).

The Jurisprudence of Interests. Selected Writings of Max Ruemelin, Philipp Heck, Paul Oertmann, Heinrich Stoll, Julius Binder, and Hermann Isay; transl. and edited by M. Magdalena Schoch, with an Introduction by Lon L. Fuller (1948).

Latin-American Legal Philosophy; papers by Luis Recaséns Siches, Carlos Cossio, Juan Llambías de Azevedo, and Eduardo García Máynez; transl. by G. Ireland, M. R. Konvitz, M. A. de Capriles, and J. R. Hayzus, with an Introduction by Josef L. Kunz (1948).

The Legal Philosophies of Lask, Radbruch, and Dabin; transl. by K. Wilk, with an Introduction by Edwin W. Patterson (1950).

Soviet Legal Philosophy; papers by V. L. Lenin, P. I. Stuchka, M. A. Reisner, E. B. Pashukanis, J. V. Stalin, A. Y. Vyshinsky, P. Yudin, S. A. Golunki, M. S. Strogovich, and I. P. Trainin; transl. by H. W. Babb, with an Introduction by John N. Hazard (1951).

development of freedom of contract in different civilizations, the growth of the concept of corporate personality, the modes in which legal concepts are formed in different laws, comparing especially the formalistic rationality of the later Civil Law with the different techniques of the Common Law, of ancient Roman law, of the sacred laws of India, Islam, Judaism, and the Roman church, etc. The richness of the contents of Weber's book, the acuteness of his observations, the objective exactitude of his method and the suggestiveness of his own thought can only be hinted at. The wealth of the book can not be exhausted in a short seminar of forty hours. But it can be used to stimulate the students' thought, to fire their imagination, and to open their eyes to the vast mass of phenomena which are comprised within the law and to make them aware of its universality as well as of its infinite variety, and of its role and function in civilization in all its variants.

The second kind of seminar in "Comparative Law—Sociology of Law" has been built around the theme of the human endeavor to replace the rule of violence by a regime of law and order. It seems that, perhaps universally, we can find a typical sequence of development. In almost all primitive societies of the past or present of which we have knowledge, we find small kinship groups within which the use of violence is regarded as illegitimate, while in the relations of the group with others resort to violence is the only, or at least the usual, way to adjust disputes. Vengeance and the blood feud seem to constitute the practically universal methods of dispute "settlement" between kinship groups which, in their internal structure, on the other hand, constitute peace units. What was the way from this primitive state of affairs to the great peace areas of the modern nations? How did there develop the way stations of mediation, arbitration, adjudication, federation? In our seminar we have been trying to trace these processes in antiquity or the Middle Ages, then to study the spheres of violence still existing in present society, such as the duel, lynching, gang warfare, and permissible self-help. Upon this basis we have then proceeded to discuss the possible ways in which the rule of law might be achieved in the last great spheres of force left today, labor relations and the international scene. Necessary expert information has been provided in this seminar by members of the faculties of other departments of the University of Chicago, especially the Oriental Institute and the Department of Sociology. Additional stimulus has been injected by the participation of students of sociology, political science, theology, oriental studies, and other fields.

When the seminar was started several years ago, we tried to broaden its scope by including such other topics as the extent of legal regulation of

social conduct as compared with customs and regulation by the non-forcible norms of social etiquette, ethics, and religion, the forms and effectiveness of legal regulation, and the problem of the causes and forms of legal change. For all these topics we could use, supplemented by a large list of other readings, the excellent book on Sociology of Law by Timasheff[2] and William Seagle's stimulating and readable *History of the Law*,[3] the character of which was better indicated by the title of its first edition, *The Quest for Law*.[4] The book is more than a history treatise in the sense of a chronological sequence of events. It rather undertakes to tie together the results of those numerous studies of detail, and those theories which have been developed upon their basis, to give a general picture of the present state of thinking about the function of law in the several stages of Western civilization. A more modest aim is pursued in René Wormser's book *The Law*[5], where the historical developments of Western civilization are pleasantly presented from Moses to Roscoe Pound, Hitler, and the Big Three. The book is not meant to constitute a text for "study" but to help the layman to get "some idea of how the law which governs us came into being." In a course on comparative law it might serve as pleasant side reading. When we came more closely to concentrate on the problem of the development of the rule of law, we began to use, in addition to other readings, Simpson and Stone's *Cases and Readings on Law and Society*,[6] especially the materials contained in Part I, Law in a kin-organized society, and Part II, Law in an emergent political society. This work contains a wealth of source materials from primitive and ancient society as well as from the contemporary American scene and the modern totalitarian states. However, the course which has been designed by the authors is conceived on somewhat different lines and thus has to cover many topics for which no place has been provided in ours. Unfortunately, the students thus have had to pay the very substantial price of a three volume work of which only about one third could be used. But a course which would try more faithfully to follow the authors' scheme would undoubtedly be stimulating.

Most courses which are designated as comparative law are conceived on lines quite different from those just described.[7] They are primarily con-

[2] A. N. Timasheff, Introduction to the Sociology of Law. (1939) xiv, 418 pp.

[3] W. Seagle, The History of Law. (1946) xxxii, 439 pp.

[4] (1941) xxx, 437 pp.

[5] The Law. The Story of Lawmakers, and the Law We Have Lived by, From the Earliest Times to the Present Day. (1949) xiv, 609 pp.

[6] 3 vols. (1949) xlvii, xliii, xlii, 2389 pp., review by Rheinstein, 17 U. of Chi. L. Rev. (1950) 422.

[7] For a survey, see J. R. Stevenson, "Comparative and foreign law in American law schools"

cerned with foreign law, and whether the name "comparative law" is quite appropriate is open to doubt.[8] Comparison presupposes knowledge of the phenomena to be compared and our students cannot be expected to know any law other than their own. Before they can start to compare they must thus be made acquainted with the foreign law, and probably no course in comparative law, as taught at present, is long enough to provide extensive knowledge of foreign law. Indeed, what do we mean by foreign law? Obviously not the totality of all the laws presently in force in all countries of the world. We must pick and choose and, just as in Europe when we speak of comparative law, we usually mean comparison of the Common Law and the Civil Law. But what is the Civil Law? Ordinarily we refer by that term to that large number of legal systems the development of which has been decisively influenced by their contact with Roman law. But the ingredients which have gone into the composites have been different in different countries, just as there have been differences in the extent and the forms in which the older or modern ingredients have been touched by Roman law materials or methods. Certainly there existed for a long time a core of legal learning and especially of legal method which was common to all the countries of Western and Central Europe, but the national codifications which began with the late 18th century have resulted in a far-reaching process of national legal isolation. But it is still possible to distinguish two major groups within each of which one legal system has exercised a leading influence. The French codes and the French methods of their exposition have set the pattern for a large number of countries, including most of Latin America. In the other group the techniques of the German Pandectists and the German codes have been influential. Yet, however widely the two groups have grown apart from each other, the common traditions are still influential and contacts have never ceased completely. Thus when we look upon all these laws from the outside, they appear as constituting some kind of a unit, especially when we contrast them with our methods of the Common Law. Yet, we ought to be careful not to impute to them more common features than they actually have. The unity among all the various countries and regions of the Common Law is certainly much greater than that between the various systems of the Civil Law. In our courses on comparative law we must thus be careful not to create false impressions. Most important, however, we must limit ourselves. We have at our disposal some forty to sixty class room hours. Clearly in that time we cannot think of teaching

50 Col. L. Rev. (1950) 613. Courses and seminars in which comparative or foreign law are used without indication in the title are not considered in this survey.

[8] *Cf.* Rheinstein, "Teaching comparative law," 5 U. of Chi. L. Rev. (1938) 615.

French or German or any other foreign law. Studying his own law is a full time occupation of three or four years for a law student in France or Germany.

Then what can we do that would be worthwhile? I think there are three or four aims which we can pursue and which are valuable in the training of a student who has come to our school to study American Law. That latter fact must never be forgotten. Whatever comparative law we inject into the curriculum of an American law school makes no sense unless it helps to make our students better lawyers of American law. Toward this end a course or seminar dealing with foreign law can indeed be valuable if it tries to achieve the following purposes:

1. Contact with foreign law should make our students aware of the fact that our institutions, laws and methods are not the only possible ones in the world;

2. Studying some institutions and methods of a highly developed foreign law should deepen our students' understanding of the corresponding institutions and methods of our own law;

3. Our students should be made aware of the fact that when they have to deal with foreign lawyers in business matters, in diplomatic negotiations or in litigation, they cannot expect these foreign lawyers to think and to argue in the ways we do;

4. Our students should be induced on their own initiative to broaden and deepen their acquaintance with the treasure house of stimulating or useful ideas and experiences which foreign countries have accumulated and from which we may profit for our own purposes.

American law schools may and do offer "comparative law" instruction aiming at different and more specialized ends, such as giving more detailed, practical instruction in handling foreign business, or introducing students to the law of a particular country as a part of what has come to be called area studies, i.e. as a means of helping students to obtain a more comprehensive knowledge of a region, for instance the Soviet Union or the Arab countries or the Far East. There are, or, perhaps better, there should be, special courses of graduate study particularly designed to open up the world of foreign law to future law teachers and legal scholars, especially to enable them to draw on foreign legal thought in the preparation of their courses and writings on American law. All such courses require special consideration and special teaching tools. We shall limit ourselves to those courses in comparative law which are meant to form part of the general undergraduate curriculum, i.e. to courses aiming at the four purposes just stated above.

I for one believe that these purposes can be achieved best in the method

which, as far as I can see, was first elaborated and applied at Columbia by Professors Jervey and Deák.[9] It consists in the incisive treatment of one or several fairly narrow but important sets of problems which present themselves in all modern countries and which are placed before the students in the way with which they are familiar, i.e through cases. This method seems presently to be used by a considerable number of American instructors, among them the present writer. It requires that there be placed in the hands of the students a collection of cases, taken from representative foreign systems, and dealing with issues which come up for decision both here and there. They must be centered around problems which are significant in themselves and the treatment of which in the several systems concerned is apt to throw light upon their characteristic methods of legal thought.

In our courses at the University of Chicago Law School we have used materials from various fields of private law. For several years we concentrated upon problems of the law of torts, especially those which are connected with the treatment of negligence cases and with the protection of privacy. In other years we took certain problems of the law of contract (duress, mistake, impossibility), of sales (warranty for quality, risk), or conflict of laws (characterisation, substance and procedure, renvoi, personal status). The preparation of the materials, especially the translation of the foreign cases, is a cumbersome and time-consuming job. It would be highly desirable that those materials which have been prepared in various places be collected and made generally available. It would be gratifying if the Association of American Law Schools could undertake that job.

The discussion of foreign cases requires background knowledge about the surroundings in which they have originated. The students cannot understand a foreign case unless they have some information about the foreign system as a whole, which means the outlines of the structure of the judicial machinery, the legal profession and personnel, the basic features of procedure, the legislative process, the codes and their arrangement, and at least the essential features of the historical development. Some of this background knowledge can be provided in the classroom; indeed discussions about the comparative roles of precedent or of legal scholarship, the legal personnel, or the systems of legal education can be particularly stimulating and fruitful. But much time can be saved, when the major part of the necessary background knowledge can be obtained from outside reading. Materials of this kind have been collected by Pro-

[9] *Cf.* F. Deák, "The place of the 'case' in the common law and the civil law," 8 Tul. L. Rev. (1934) 337.

fessor Schlesinger in his *Comparative Law-Cases and Materials*.[10] This book can be very useful in this respect, even though it may not entirely serve the broader purpose for which it seems to have been written, viz. that of providing a complete set of materials for a course on comparative law. In one academic quarter I tried to use it in this way, but I was not fully satisfied with the result, at least for my purposes. I emphasize this latter point because I understand that Professor Schlesinger's comparative law courses at Cornell are held in high esteem, and apparently the book has grown out of the author's own teaching experience. If, however, we assume that teaching of comparative law to American undergraduate law students is to serve the purposes which we have tried to state above, the book appears to be simultaneously too broad and too narrow. It seems that Professor Schlesinger aims primarily at teaching the students how to handle a foreign law problem as it may come up in the American practice of law. Clearly, this is a desirable end, but whether it is attainable depends on how we define it. If it is meant that an American lawyer should be able to answer a foreign law problem, it is clearly unattainable, except for a few highly trained specialists. The end is well within reach, however, when we are satisfied with training our students to spot a foreign law problem, to know when an expert must be called in and to make them aware of the danger of misunderstandings which may arise in the correspondence or conversation or negotiation between lawyers trained in different legal systems. On this latter point Professor Schlesinger's book contains excellent materials, especially cases of striking misconception of foreign law. Instructive are also the cases dealing with ascertainment and proof of foreign law in American courts. More properly that topic would belong in a course on conflict of laws. As it is notoriously neglected there, it is gratifying to find it dealt with in this book on comparative law. However, the author had to keep his book within manageable size. He had thus to hold back on the number of the foreign cases which he could include. In our opinion such cases are the very meat of the course; we thus need more than just the eighteen which we find in this book of 550 pages and which deal with so many different subjects that none of them comes to stand out in clear relief. Of reading material of a general informational nature, one, or at least this reviewer, would also like to see more, especially on historical development. But most of the background readings which can be found in the book are well chosen and informative and will be helpful in any course on comparative law (in the sense of introduction to the Civil Law). Professor Schlesinger's book is the first published American

[10] (1950) xxxiv, 552 pp.

work of its kind. It constitutes an experiment. Comparative law, as we have tried to show, is a word of many meanings and the question of how it can best be put to use in law school instruction is far from being settled. My own opinions, as they have presently crystallized upon long experimentation, happen to be different from those of Professor Schlesinger, and for a course as I presently think it should be taught his book is not suited to form *the* one and only basis. I also doubt it whether it contains enough material to satisfy the needs of an American law teacher who does not already have a good knowledge of some one of the Civil Law systems. But whether any such book can ever be designed is doubtful in any case. However, let us repeat it, the book is highly stimulating and useful, not only because of its own contents but also because of its extensive bibliographical index.

Another indispensable book for the comparative law scholar is the book on Comparative Law by Professor Gutteridge of Cambridge, England.[11] Its main emphasis is on the comparative method as such and on the uses to which it can be put in fertilizing our own Common Law thought, in international legal practice, in international law, and in the movement for international legal unification. It does not contain much information on background knowledge of foreign law, but it gives an accurate and richly documented picture of the history of the comparative method, its present cultivation in the world, and especially of those uniform law movements which have been undertaken, including the work of our own Commissioners on Uniform State Laws, which appears in a new light when it is seen in connection with similar endeavors in other parts of the world. The value of the book has been proved by the fact of the publication of a new, revised edition just a few years after the publication of the first.[12]

The most extensive background information on the world's legal systems is contained in two works which have been published in French and are thus closed to the majority of our students. In the second part of his *Traité élémentaire de droit civil comparé*,[13] Professor René David of the University of Paris has undertaken to do for French students exactly what we hope should soon be done for Americans. There we find a series of chapters giving concise and precise introductions to the legal systems

[11] Comparative Law. An Introduction to the Comparative Method of Legal Study and Research. (1946) xii, 208 pp.

[12] 2 ed. (1949) xv, 214 pp.

[13] René David (professeur de droit civil comparé à la Faculté de droit de Paris), Traité élémentaire de droit civil comparé. Introduction à l'étude des droits étrangers et à la méthode comparative (1950) vi, 556 pp.

of the Western world, divided into the "groupe française" and the "groupe anglo-américaine," to Soviet law, Islamic law, Hindu law, and Chinese law. In a somewhat strange way, the Western laws of the "Germanic countries" are not given a chapter of their own but are only discussed, by way of comparison, in the chapter on the "groupe française." To all those American students who are able to read French, the book should be highly useful not only because of its information on the Civil Law systems and the laws of the East, but also because it illustrates how our law looks to an acute and well-informed foreign observer. He should also profit from Professor David's thoughtful discussion of the comparative method in law and its uses, from his detailed presentation of the world's institutes, libraries, and teaching organisations in the field, and from the rich, world-wide bibliography.

Conceived on similar lines but carried out on a larger scale is the three volume *Traité de droit comparé* by Arminjon, Nolde, and Wolff.[14] These authors are among the most eminent European scholars in the field. Professor Arminjon, author of well-known and highly original works on conflict of laws, was for many years a judge in the Mixed Courts of Egypt and a teacher in the universities of Cairo, Geneva, and Lausanne. Baron Nolde was one of the most distinguished scholars of Civil Law, International Law, and comparative law of prerevolutionary Russia. Professor Martin Wolff, author of authoritative German treatises on the law of property, family, and conflict of laws, and famous as a brilliant law teacher in pre-Hitlerite Germany, has been living since the 1930s in England, where his treatise on English conflict of laws has already come to exercise a considerable influence on English legal theory and practice. The main part of their work is devoted to a presentation of the great legal systems of the world, viz. the French system and those which are derived from it; the German system and those which are derived from it; and the systems of the Scandinavian, the English, the Soviet, the Islamic, and the Hindu laws. The parts on the French, the German, and the English systems are veritable treatises of 590, 240, and 360 pages respectively. The others are presented in a less extensive, but still instructive fashion. American law, with the mysteries of which none of the authors has had a personal acquaintance, is treated somewhat cavalierly as a sixteen page chapter in the part on English law and occasional references in the substantive chapters of that part. Every one of the parts is addressed to readers who are not familiar with the system in question, and the authors have well succeeded in that difficult task of translating legal ideas. In this

[14] Pierre Arminjon, Baron Boris Nolde, and Martin Wolff, Traité de droit comparé. Vol. 1, (1950) 540 pp.; vol. 2, (1950) 635 pp.; vol. 3, (1952) 614 pp.

sense the book is an accomplishment of applied comparative law, and comparative law as such is expressly treated in the first two parts which are devoted to the definition of the nature and concept of comparative law, to comparative law as a tool for practical purposes and as a science of its own, and to a brilliant presentation of those elements which are common to all modern legal systems. Here the authors have traced the historical forces as well as the modern movements for legal unification, especially in the fields of patents and copyrights, transportation, maritime law, negotiable instruments, and labor relations. Particular historical introductions are also given for every one of the seven systems presented. The presentation of the laws themselves is practically limited to private law, and the mode of exposition is more or less that of the survey book. This method makes for clarity, but also implies a certain dryness. If we wish to obtain accurate first hand information about the French law of torts, the Scandinavian law of marriage, or the Islamic law of trusts, we shall find it in this treatise. It tells us little, however, about the economic, political, philosophical, or other social forces by which these rules and institutions have been moulded. Except for brief surveys of court organization, there is also little information about that general framework of political and social organization, without a knowledge of which the law assumes the deceptive appearance of a self-contained entity. To understand our law we have, among many other things, to know the personnel by which it is administered, and the same holds true for every other system. But for that endeavor which Rabel has called dogmatic comparison of laws, the new treatise is a wonderful tool, while for that other kind of comparative law which seeks to understand legal phenomena as expressions of a nation's entire life, the necessary preparatory research is lacking almost completely. To those detailed studies which have been made in this country of certain narrowly circumscribed institutions, as for instance Berle and Means' book on the modern corporation,[15] we do not find many counterparts abroad. The few which exist should not be neglected, however, in our own studies of comparative law. I am thinking in this connection especially of Menger's book on the political, social, and economic bases of the German Civil Code,[16] of Karl Renner's inquiry into the social functions of private law,[17] of Bonnecase's history of legal

[15] The Modern Corporation and Private Property (1932).

[16] Karl Menger, Das bürgerliche Recht und die besitzlosen Klassen (1890).

[17] The Institutions of Private Law and their Social Functions, with an Introduction and Notes, by O. Kahn-Freund. (1949) viii, 307 pp., particularly useful through Professor Kahn-Freund's Introduction and Annotations, by which Renner's original text of 1929 is brought up to date, and brought into comparative contact with English law. Renner, who died in 1950 as Federal President of the Austrian Republic, was known as a leading theoretician of moderate socialist outlook.

thought in France[18] and, above all, of Hedemann's exciting description of the legal developments of the 19th century in Western and Central Europe.[19] It may also not be inappropriate to remind ourselves of the existence of such a pioneer work as Dicey's *Law and Opinion*.[20]

Returning, however, to more positivistic presentations of legal phenomena, we must also mention the great German encyclopaedia of comparative law,[21] the entire first volume of which contains monographic essays, with bibliographies, of all countries of the world.[22] It would be highly desirable to have a new edition in which these essays were brought up to date.

In our effort to define the role of comparative law in American legal education and of suggesting a method in which it could be put to use in this context, we have emphasised the necessity of placing before the students an ample volume of foreign source materials, preferably cases, and to concentrate these materials upon one particular set of problems of manageable size. Of course, cases need not be the only kind of sources. Indeed, for any presentation of Civil Law problems, it is indispensable also to make available the pertinent statutory provisions. If a book presents both kinds of modern materials together with a full set of historical sources from Roman law and systematic discussions on the historical development of the interim period as well as a searching comparative analysis of the pertinent Common Law doctrines, we have what might well be called an ideal book for academic use. Exactly of this kind is the recent work on *Negligence in the Civil Law* by Professor F. H. Lawson of Oxford.[23] It is a work of widest learning, painstaking scholarship, and fine pedagogical skill. It is not a case book in the traditional American sense, although it contains the complete set of those French cases in which there has found expression the modern French law of liability for negligence, which, it may be noted, has been entirely judge-made. As the book has

[18] J. Bonnecase, La philosophie du Code Napoléon appliquée au droit de famille. Ses destinées dans le droit civil contemporain (2 ed. 1928); La pensée juridique française de 1804 à l'heure présente, ses variations et ses traits essentiels (1933) 2 vols.

[19] J. W. Hedemann, Fortschritte des Zivilrechts im 19. Jahrhundert. Ein Überblick über die Entfaltung des Privatrechts in Deutschland, Österreich, Frankreich und der Schweiz (1918, 1930) 2 vols.

[20] The Relation between Law and Public Opinion in England in the Nineteenth Century. (1905); 2 ed. (1914).

[21] Rechtsvergleichendes Handwörterbuch für das Zivil- und Handelsrecht des In- und Auslandes, edited by F. Schlegelberger in conjunction with Heinrici, Magnus, Mügel, Simons, Tietze und Wolff (1929) 7 vols.

[22] The other volumes contain alphabetically arranged monographs on the main topics of private and commercial law, aiming at descriptive comparative presentation of all modern legal systems.

[23] (1950), xvi, 341 pp.

been written for English students, the author could insert these as well as other French and German texts in their original languages in which, after all, they should be read if we are to avoid the inevitable inaccuracies of translation. Unfortunately, this fact would seem to exclude the usability of the book in America law schools. But otherwise I do not know of any other book which would be so well suited for our purposes.

Next to Lawson we should mention Dawson. His Rosenthal Lectures on *Unjust Enrichment*[24] were not published to serve as a case book, or "text" on comparative law. But they constitute a model of the ways in which comparative law can be used to clarify and enrich our ideas in one important field in which Common Law thought has been lagging behind the rich development of the Civil Law. In an eloquent and scholarly manner, this development is traced from Roman Law through medieval law to the doctrines and the practice of modern France and Germany, after stating first the sources of our present difficulties and using the results as a guide for "our own path through the forest." We ought to be grateful to Professor Dawson for what he has done. Supplemented by a set of cases and other source materials his book would be a fascinating basis for a course. Even without them it is the best illustration to demonstrate to our students what comparative law can do for our law.

A work of peculiar originality is Professor Vinding Kruse's *Right of Property*.[25] This Danish scholar has felt the need for a new social science which would be based on positive observation rather than philosophical speculation. Like that of other Scandinavian thinkers, his approach resembles that of our own realists, of whom some at least hope to discover the way toward the "good society" by accurate, "scientific" observation and description of social phenomena. Since the publication of the Danish original of his book on property, Professor Vinding Kruse has found it necessary to inquire into the possibility of establishing by the method of science the ultimate values of society.[26] In his book on property Professor Vinding Kruse takes the values of a free society for granted and investigates the role which is played in it by property rights, including those in intellectual, artistic, and esthetic values. These rights are approached

[24] John P. Dawson, Unjust Enrichment. A Comparative Analysis. (1951) x, 201 pp.

[25] Fr. Vinding Kruse (professor of law at the University of Copenhagen), The Right of Property, transl. from the Danish by P. T. Federspiel (Oxford, 1939). xvi, 495 pp.

[26] The Foundation of Human Thought. The Problem of Science and Ethics. (London and Copenhagen, 1949) 404 pp. The same recognition of the need to clarify the epistemological bases of jurisprudence impelled Professor Vinding Kruse's colleague at the Law Faculty at Copenhagen, Professor Alf Ross, to write his Kritik der sogenannten praktischen Erkenntnis, zugleich Prolegomena zu einer Kritik der Rechtswissenschaft. (Copenhagen and Leipzig, 1933) 356 pp.

from the point of view of the lawyer who is primarily interested in the technical legal aspects of rights in land, techniques of transfer of property rights, protection of bona fide purchases, recording, protection of property rights, etc. Additional historical, analytical and sociological material can be found in the work of C. R. Noyes, in which the problems are penetratingly attacked from the point of view of institutional economics.[27] The English edition of Professor Vinding Kruse's book is a highly condensed version of the three volumes of the original Danish edition[28] of which the full text is also available in a German translation.[29] In the English version some parts are quite sketchy, and the English is not always easy reading. Some difficulties may also arise from the fact that the author himself does, of course, not start out from common law ways of arrangement or terminology. But for that very reason the book may be a specially suitable avenue to comparative law thinking, as the reader will soon discover the familiar problems and institutions behind the foreign disguise. As the author takes as his starting point his own Danish law, the book can also serve as a welcome introduction to the legal systems of Scandinavia, which are remarkable for the unique way in which the most progressive ideas are combined with an unbroken tradition. These laws are full of suggestive ideas. They are not easily accessible to us, but they should find greater attention in our comparative law work. Parts of Professor Vinding Kruses's property book have been combined with new comparative inquiries in the fields of human rights, constitutional law and business regulations in his more recent work on *The Community of the Future*.[29a] The treatment is less technical and the book is addressed not solely to the adept of legal learning but to all those who are concerned with the "new community and [the] new type of man [that is to] save mankind." The work is an impressive illustration of the ways in which comparative law learning can be used for higher purposes.

Positive materials from all the world's legal systems, together with penetrating analysis and creative synthesis, are also presented in Ernst Rabel's great treatise on comparative law of conflict of laws.[30] An exciting

[27] C. Reinold Noyes, The Institution of Property. A Study of the Development, Substance and Arrangement of Property in Modern Anglo-American Law. (1936) xiv, 643 pp.; see review by Rheinstein, 4 U. of Chi. L. Rev. (1937) 686. In spite of the subtitle, the book is truly one of comparative law.

[28] Vinding Kruse, Ejendomsretten. 3 ed. (1951) 3 vols.

[29] Das Eigentumsrecht (1931) 3 vols.

[29a] London and Copenhagen (1950), 828 pp.

[30] The Conflict of Laws. A Comparative Study. Michigan Legal Studies. Vol. 1. Introduction; Family Law. (1945) lvi, 745 pp., vol. 2. Corporations; Torts; Contracts in General. (1947) xli, 705 pp., vol. 3. Special Obligations; Modifications and Discharge of Obligations. (1950) xlvi, 611 pp. Let us hope that there will also be made available in English Rabel's

course could be based upon this book, especially if it were supplemented by a collection of the texts of some of the cases.

In recent years comparative law has found a new application in American law schools. In growing numbers students from foreign lands have been coming to this country, not to follow here the complete American law curriculum, but to stay for about one year and to use it to get acquainted with American institutions in general and the bases of the legal system in particular. If the time of such students is to be used properly and if we wish them to return to their home countries with a real impression of the American legal scene rather than in a state of bewilderment and confusion, we have to devise ways to take care of their special needs.[31] New York University Law School has designed an entire curriculum to meet the needs of a special group of foreign students, viz. those coming from Latin-America. Within this framework, Professor Eder, of the New York bar and of the bar of the Republic of Colombia, has composed a series of lectures to introduce the Latin-American students to American law and its techniques in general, and particularly to those parts of American private law in which our approach is markedly different from that of the Civil Law, viz. torts, equity, trusts, and future interests. These lectures have been published in a book in which our institutions and methods are constantly confronted with those of the Latin countries.[32] The book thus also constitutes an expert introduction for American readers to the private law of Latin America, both to its theories and to those of its aspects which are of special importance in the international practice of law. The lively style, the author's practical experience, and his scholarly learning should render it attractive and instructive.

Another book which may well serve as a basis for an introductory course for foreign students of American legal instutions is Professor Shartel's enlarged version of his Cooley Lectures on *Our Legal System and How It Operates*.[33] The book is written primarily as a first introduction for American prelegal and law school students. It thus neither utilizes comparison with foreign law nor does it include that "civics" knowledge which the American student has absorbed simply by living in this country, and in his social studies from kindergarten on. For the student of American

great work on the comparative law of sale of goods, Das Recht des Warenkaufs. Eine rechtsvergleichende Darstellung. Vol. 1. Berlin (1936) xxxii, 533 pp. The second volume is to be published shortly.

[31] *Cf.* Rheinstein, "The German Referendar Training Program at the University of Chicago Law School," 3 J. of Leg. Educ. (1950) 273.

[32] Phanor J. Eder. A Comparative Survey of Anglo-American and Latin-American Law. (1950) xii, 257 pp.

[33] Michigan Legal Studies. (1951) xxvii, 629 pp.

law, both domestic and foreign, this background knowledge might well be supplemented by more detailed studies of the personnel of the administration of justice. Instructive materials of this kind are contained in Dean Pirsig's *Cases and Materials on the Administration of Justice.*[34] In an introductory seminar for foreign students they could serve well to complement Professor Shartel's book, of which major parts have been successfully used by him for this very purpose.

Our survey of the literature has been limited to books of recent vintage. We have not been aiming at completeness and we have not touched upon the many older works in the field, such as the writings of Lambert,[35] of Ehrlich,[36] of Wigmore[37] or of Maine,[38] and we have not touched upon Roman law as a possible avenue to approach civil law and comparative law.[39] We have not mentioned either the wealth of articles in periodicals, American or foreign. For our work in comparative law, we have plenty of tools. It is for us to use and to augment them.

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[34] (1946).

[35] Edouard Lambert, La fonction de droit civil comparé. (1903). Numerous articles of theoretical and applied comparative law are collected in the three volumes of essays published in honor of Lambert and entitled Introduction à l'étude du droit comparé. Recueil d'études en l'honneur d'Edouard Lambert. 1938.

[36] Fundamental Principles of the Sociology of Law, transl. by Moll. (1936) xxxvi, 541 pp.

[37] Panorama of the World's Legal Systems. (1936) 3 vols.

[38] For a list of his writings, see J. Stone, The Province and Function of Law (1946) at p. 818; see also the chapter on Maine, at p. 451.

[39] *Cf.* in this respect Albert Ehrenzweig, "A common language of world jurisprudence. Teaching Roman law in twenty hours" 12 U. of Chi. L. Rev. (1945) 285.

The most scholarly selective bibliography of the literature of Roman law is given in the latest work on the subject, H. J. Wolff, Roman Law. An Historical Introduction. (1951), xiii, 260 pp. In this remarkable book the "external" history of the law of ancient Rome and its role in medieval and modern times is presented upon the basis of the latest research, which has thrown new light on many aspects of the field and resulted in many new discoveries. The book should serve as the most up-to-date introduction to the study of the historical background of modern Western law. It might be supplemented by P. Koschaker's Europa und das römische Recht, (Munich, 1947), which presents the role of Roman law as one of the elements upon which European civilization grew up as a unit prior and superior to the national states of modern times. Its translation into English is urgently needed.

Notes and Comments

TWENTY-FIVE YEARS OF MIXED COURT OF TANGIER

At a time when the importance of North Africa in world affairs is growing and American business connections with that part of the world are increasing, the first twenty-five years of existence of the Mixed Court of Tangier should be duly noted. This Mixed Court, on which no United States judge sits,[1] is part of the international government of the Tangier Zone. The Court came into existence in 1925 under provisions of the Tangier Statute of 1923, which is the Convention regarding the Organization of the Statute of the Tangier Zone signed in Paris the 18th of December 1923.[2] The United States, though a signatory of the Act of Algeciras of 1906,[3] did not accede to the Convention of 1923 because it was felt that the representation accorded to the United States was so small that they could not afford to be responsible for policies in the formulation of which they had no real influence.[4]

The Mixed Court was originally manned by four judges, two from Great Britain, one from France, and one from Spain. Since the revision of the Tangier Statute in 1928,[5] the Court is composed of five titular members, a Belgian, a British, a French, an Italian, and a Spanish judge.[6] France and Spain furnish each a Zone attorney to represent the public interest. About fifty attorneys are admitted to practice before the Court. The Court has several sections, including one to hear appeals from decisions of the other sections.[7] In 1948, some 3,000 decisions were handed down.

The Mixed Court is responsible for the administration of justice to nationals of foreign powers.[8] Native courts function where the Mixed Court has no jurisdiction. The State Bank of Morocco is under the jurisdiction of a special tribunal from which appeal goes to the Swiss Federal Court in Lausanne.[9] The law applicable in the Mixed Court is found in Codes drafted for the Zone in 1924

[1] The United States was represented on the—now defunct—Mixed Courts in Egypt. See Brinton, Closing of the Mixed Courts of Egypt, 44 Am. J. Int'l L. (1950) 303.

[2] Text in Stuart, The International City of Tangier (1931) 239.

[3] See 1 Hackworth, Digest of International Law (1940) 86.

[4] Stuart, *op. cit., supra* note 2, at 123.

[5] Text in Stuart, *op. cit., supra* note 2, at 273, 280.

[6] Art. 1, as amended, of the Dahir concerning the Organization of an International Tribunal at Tangier.

[7] Art. 2 to 5 of the Dahir of 1923 concerning the Organization of an International Jurisdiction at Tangier. Stuart, *op. cit., supra* note 2, at 197.

[8] Art. 48 (1) of the Tangier Statute of 1923. Discussed in 2 Ménard, Étude Critique du Régime Spécial de la Zone de Tanger (Maroc), (1933) at 105. Of course, if the establishment of the Mixed Court operates, under Article 13 (1) of the Convention of 1923, as abolishment of the Capitulations, this applies only to the Powers which signed or acceded to the international Statute. *Cf.* 2 Hackworth, *op. cit., supra* note 3 (1941) at 495.

[9] Art. 45 of the Act of Algeciras of 1906. Banque d'État du Maroc v. Gouvernement Chérifien, Swiss Fed. Trib., Sept. 27, 1940, 1 Annuaire Suisse de droit international (1944) 140.

and in subsequent enactments. These are: a Code respecting the Civil Status of Foreigners in the Zone; a Commercial Code; a Penal Code; a Code of Criminal Procedure; a Code of Obligations and Contracts; a Code of Civil Procedure; and a Land Registration Code. The Codes in force in French and in Spanish Morocco, but in particular those in the French Zone of Morocco, were used as models. This applies notably to the important Code respecting the Civil Status of Foreigners in the Zone,[10] which is a copy of the Dahir of August 12, 1913, for the French Zone of Morocco on the Civil Status of Frenchmen and Foreigners, drafted by A. de Lapradelle.[11] The Codes and other enactments, and summaries of court decisions, may be found in a compilation in French and Spanish brought out recently under the direction of one of the judges of the Court.[12] The Official Bulletin of the Zone brings current enactments.[13] A law journal, under Spanish direction, which was started recently, reports court decisions from time to time.[14] French and Spanish law journals have occasionally brought Mixed Court decisions.[15]

Interestingly enough, the Mixed Court continued to function during the Spanish occupation of the Zone from 1940 to 1945. When this interlude was brought to an end by the Conference of Experts on Tangier held in Paris in August 1945 with American participation,[16] changes in the composition of the Mixed Court were contemplated by the Conference for the future. Resolution No. 4 of the Final Act of the Conference concerning the Reestablishment of the International Regime in Tangier provides that "under the final Statute of the Tangier Zone the Governments of the United States and the Union of Soviet Socialist Republics should be entitled, if the present judicial organization is maintained, to be represented on the Mixed Tribunal by a titular judge in the same manner as the Governments of France and the United Kingdom".[17] The final Statute of the Tangier Zone was to be written by a Conference of

[10] A statute consisting of twenty-one sections. Textes Organiques & Codes de la Zone de Tanger 97 (French official ed. Rabat 1925), 2 Ménard, *op. cit.*, *supra* note 8, at 195; *id.*, "Questions de droit international privé dans la Zone spéciale de Tanger," 31 Revue Critique de Droit International (1936) 647.

[11] See Lapradelle, Introduction, in 1 Code et Lois en vigueur dans le Protectorat français du Maroc 282 (Off. ed. 1914); Ménard, Traité de Droit international privé marocain (Zone d'influence française et zone spéciale de Tanger) (1935) 3 vols.; Rivière, Traité du Droit Marocain 349 (1948); de la Plaza, Derecho de Marruecos (1941) 132. *Cf.*, for a summary, Liebesny, The Government of French North Africa (1943) 39.

[12] Manuel Diaz Merry, Tanger—Tratados, Codigos, Leyes y Jurisprudencia de la Zona Internacional (Distribuciones Iberica, S. A.: Tanger, 1949).

[13] French and Spanish editions, published by Bureau de l'Intérieur (Administration Internationale de la Zone de Tanger).

[14] Astrea, Revista de legislación y jurisprudencia (26 Bulevar Antea, Tangier). The Revue mensuelle de législation et de jurisprudence de la Zone de Tanger, it seems, has been discontinued.

[15] Notably, the Recueil de Législation et de Jurisprudence Marocaines (Penant, ed.).

[16] 13 Dep't State Bull. (1945) 48, 380, 613; 9 Hudson and Sohn, International Legislation (1950) 653. *Cf.* 40 Am. J. Int'l L. (1946) 185.

[17] 13 Dep't State Bull. (1945) 615.

all signatories of the Act of Algeciras.[18] This Conference was not held. As a result of the agreements of August 1945, the United States has, however, now a representative on the Committee of Control, which administers the Zone, and the International Legislative Assembly now includes three members of United States nationality.[19]

Nationality problems play their role also in the selection of the assistant members of the Mixed Court—laymen, who sit with the titular judge—and of the jury.[20] A discussion of details in this note would serve no useful purpose but an up-to-date study of the Tangier Mixed Court could be interesting and timely.

K.H.N.

NEW LEGISLATION

SPAIN: NEW LAW OF STOCK COMPANIES, JULY 17, 1951—The Spanish Commercial Code of 1889 was the supreme expression of *laissez faire*, especially as to stock companies. It contained only 24 articles on the subject and many important matters were not regulated by any legislation and were left wholly to the articles of incorporation or to the future action of the shareholders. The new law[1], promulgated after long gestation, fills these lacunae in a text of 171 articles, 21 transitory provisions, and two final articles. It is inspired in part by modern legislation in other countries, in part by corporate practices and court decisions in Spain, and seems to be a happy blend of these elements. It is well worthy of study and will doubtless be of aid to Latin American countries contemplating corporate reforms. Only a few of the innovations can be here noted.

No definition is attempted. The introductory article (art. 1) merely states that in a stock company the capital, which shall be divided into shares, shall be constituted by the contributions of the shareholders, who shall not be personally liable for the corporate obligations. The use of the words "*sociedad anónima*" in the name of the company is obligatory.

The important principle of the former Code that no government authorization or subsequent intervention, is required for the formation of a company is fully maintained, in striking contrast to tendencies in Spanish-American countries. The corporate form is required for all organizations, except general or special partnerships not issuing shares, when the capital exceeds five million pesetas. Existing limited liability firms (*sociedades de responsabilidad limitada*) or special partnerships with shares, with a higher capital must either be transformed into stock companies, reduce their capital, or be dissolved within three months (arts, 2, 3 transitory). The full authorized capital must be subscribed

[18] See Resolution No. 1 of the Final Act of the Conference.

[19] *Cf.* Article 7 of the Anglo-French Agreement for the Re-Establishment of the International Administration of Tangier, 13 Dep't State Bull. (1945) 616, 9 Hudson and Sohn, *op. cit., supra* note 16. Stuart, The Problem of Tangier, 1 Year Book of World Affairs (1947) 92, 106.

[20] Articles 1, 6, 10, as amended, of the Dahir concerning the Organization of an International Jurisdiction at Tangier, Stuart, *op. cit., supra* note 2, at 266, 280.

[1] Boletín Oficial del Estado, No. 199, July 18, 1951.

and one fourth paid in (art. 8). The former requirements for publicity by recording in the Mercantile Registry and publication are strengthened. The company may be organized either by simultaneous act or by public subscription; in the latter case, as also on the issue of new stock, the requirements for the prospectus are minutely regulated. Provision is made to guard against watered stock issued for property. Issuance of shares for services is prohibited, but the promoters may be given founders' shares or other participation certificates entitling them to not more than 10% of the profits for a maximum period of 15 years (art. 12). Bearer shares may be issued only when fullpaid (art. 34). Preferred shares are provided for (art. 93).

The law attempts to safeguard the interests of minority shareholders by sundry provisions; *inter alia*, speedy action in court against resolutions that are in violation of law or the bylaws or are injurious to the company, with the right to a temporary injunction in certain cases (arts. 66 *et seq.*); actions against the directors and officers or for their removal (arts. 80 *et seq.*); cumulative voting (art. 71); compensation of directors must be fixed in the bylaws and if sharing profits, the service of the reserve funds and a dividend of at least 4% must first be provided for (art. 74); shareholders representing 10% of the stock have the right to appoint a member of the auditing committee (art. 108); dissenting shareholders have the right to withdraw from the company and to be paid the value of their stock in case of change of objects, transformation or merger (arts. 85, 135, 144). Shareholders cannot be deprived of voting rights nor of a preferential right to subscribe to new issues (art. 39).

Entirely new are the requirements respecting the contents of the balance-sheet (art. 102 *et seq.*) and the regulation of bond issues (arts. III *et seq.*). Transfer of all the stock to a single owner is not a ground for dissolution (preamble and Art. 150, following decisions of the Supreme Court under the old Code).

Except to the extent necessary to protect vested rights, the new law governs existing corporations, and they must conform their bylaws to its provisions within two years (arts. 1, 21 transitory).

P.J.E.

DOMINICAN REPUBLIC: LAW OF CHECKS—The Dominican Republic on April 30, 1951, enacted a Law on Bank Checks.[1] The law, consisting of 70 articles, is complete, well-drafted and consonant with the Spanish idiom and legal concepts. In essential features, it does not differ from our law. Special provisions for collection by the heirs of an uncollected check held by a decedent or of a check issued to an estate (art. 35); for checks expressed in a foreign currency (art. 36); for procedure in relation to lost checks (art. 36 Bis); for *force majeure* extending the time for presentation, normally two months (arts. 29, 48); and for penal sanctions (art. 66) are of iterest. Crossed checks are authorized

[1] Official Gazette, No. 7284, May 12, 1951; reprinted in 4 Boletín del Instituto de Derecho Comparado de México, No. 12, Sept.-Dec. 1951, pp. 159–175.

(arts. 37–38). Protest for dishonor is normally required, but may be waived (arts. 40–43). The statute of limitations is six months, not barring, however, a suit for unjust enrichment (art. 52). The issuance of certified and cashier's checks to bearer is prohibited; such checks are not subject to the two months term for presentation (art. 57 bis).

P.J.E.

DECISIONS

UNITED STATES AND BELGIUM: VALIDITY OF BELLIGERENT OCCUPANT'S DECREES—Under the doctrine of the nineteenth century, the right to wage war was regarded as a natural concomitant of the principle of unlimited national sovereignty, and even wars of aggression were not deemed to be illegal as long as they were conducted in consonance with the international conventions laying down the canons of warfare. The right of a belligerent to occupy and govern the territory of an enemy was held to be an incident of war and to flow directly from the right to conquer. Hence, the authority exercised by the military occupant was not *per se* unlawful and his decrees were, as a general rule, held entitled to respect as long as they did not contravene the regulations on belligerent occupation adopted by the Hague Convention of 1907.

The recent change of international attitude with regard to the legality of aggressive warfare, as evidenced by the Kellogg-Briand Pact, the United Nations Charter, and the decision of the Nuremberg International Tribunal, is bound to have a substantial effect on the further development of the law of military occupation. Are the inhabitants of an occupied territory obligated to obey the decrees of an invader who violated international law by embarking on a war of conquest? To what extent, if at all, are such decrees binding upon the regime succeeding the occupant? Is the continued validity of the Hague regulations on belligerent occupation placed in doubt by our revised notions with regard to the lawfulness of war? Questions such as these have troubled the courts of various countries since the end of World War II, and there is little reason to believe that, with respect to the future, we are dealing here with a closed chapter in the book of the law of nations. Under these circumstances, more than a passing contemporary interest may be served by giving our attention to two recent decisions, one by the Federal District Court for Utah, the other by the Court of Appeals for the Belgian city of Liège, which raise and decide fundamental questions in the law of military occupation.

The case of *Aboitiz & Co. v. Price*, 99 F. Supp. 602 (D. Utah, 1951) involved a financial transaction between a bank in the Philippine Islands and an American national during the period of Japanese occupation of the islands. The defendant was a national bank examiner attached to the staff of the American High Commissioner in Manila. In 1942, when the Japanese armies overran the Philippines, he was interned as an American citizen and held in captivity until the liberation of the islands by American troops. The internees underwent terrible suffering at the hands of the Japanese, and many of them died of starva-

tion. In 1943, with the help of intermediaries, the defendant managed to obtain from the plaintiff bank a loan of over 16,000 pesos in military pass-money issued by the Japanese government. Repayment of the loan was secured by promissory notes, which were payable on demand and bore no interest. The defendant used the money to obtain food and pay the necessary bribes to the guards of the internment camp.

After the war, the present suit was brought on the notes. The defendant denied his liability on the ground that the notes were void for illegality. Assuming the Japanese occupation decrees were valid, he argued, the notes were rendered nugatory by a law prohibiting traffic in money between civilians outside and inmates of internment camps under penalty of death. If the decrees were unlawful, on the other hand, the Japanese fiat currency should be regarded as an illegal consideration for the notes.

Judge Willis W. Ritter rejected these contentions of the defendant and entered an order for the payment of the notes. He held that, notwithstanding the fact that the Japanese occupation of the Philippines was a crime under international law, the regulation of the Japanese authorities specifying the currency to be used in the Philippines was a valid regulation of a belligerent occupant which should be recognized by the courts of this country; consequently, such currency as consideration for the notes was not illegal. The alleged edict imposing the death penalty on financial aid to internees, on the other hand, was held by the judge not to be entitled to recognition by our courts, since it was contrary to our principles of public policy as well as to our notions of justice. In differentiating between the two types of decrees, Judge Ritter was guided by the consideration that decrees of an occupant, such as war currency measures, which are designed to keep the economic life of the occupied country going and to enable its inhabitants to engage in the daily transactions of trade and commerce, should be regarded as lawful under international law. A measure, on the other hand, which prohibited persons under penalty of death from helping a citizen of an enemy country to survive cruel and barbarous imprisonment, lacked in his opinion the sanction of international law and offended our notions of *ordre publique*.

The decision of the Court Appeals of Liège dated March 21, 1951 (*Jurisprudence de la Cour d'Appel de Liège*, 1951, No. 35, p. 273) dealt with the validity of measures taken by the Germans during the occupation of Belgium in World War II. The overconcise statement of facts by the court, characteristic of French and Belgian judicial decisions, makes it difficult to obtain a clear picture of the events leading to the lawsuit, but it appears that the essential facts were as follows: The German army of occupation requisitioned a building from the plaintiffs, a Belgian partnership. The Germans then ordered the city of Liège to install a new heating plant in the building. A German ordinance dated December 17, 1940, imposed the payment of compensation for requisitions made by the German army upon the Belgian state. Certain Belgian administrative circulars, issued in co-operation with the German military authorities, made the local government bodies primarily responsible for such

requisition payments, but gave these bodies a right of reimbursement against the state.

After the end of the occupation, the plaintiffs sued the city for payment of an indemnity for the house requisitioned during the war. The city resisted the claim and contended that, in any event, it was entitled to deduct the cost of the installed heating plant from any award made by the court. The Belgian government intervened in the suit on the ground that a judgment against the city might give rise to a claim for reimbursement against the state.

The lower court decided in favor of the plaintiff. The appellate court reversed the judgment, holding that the court below was not authorized to give any effect to the decrees of the occupant or to administrative measures designed to carry them into execution. The court rested its decision on the broad principle that "according to a doctrine well-established today, the decrees of an occupant are not enactments of a legitimate power, and they do not become incorporated into the national law or the national institutions." In refuting the assertions of the plaintiff, the court indicated, however, that it also considered the German ordinance of December 17, 1940, void on the more specific ground that it was violative of Art. 52 of the Hague Regulations respecting the Laws and Customs of War on Land, since that article required payment of compensation for requisitioned property by the occupying power rather than the occupied country.

It would seem that the second ground of the Belgian decision offers a sounder basis for the denial of the plaintiff's claim than the overbroad generalization of the first. To carry the logical implications of the doctrine of illegality of aggressive warfare to a point where *any and all* measures taken by the aggressor in an occupied country are considered tainted with the initial illegality of the enterprise, must lead to consequences little short of legalized chaos. Under this view, no transaction entered into by the people of the occupied country pursuant to a law passed by the occupant would be safe from legal challenge after the occupation has terminated. Judge Ritter's differentiation between measures apt to benefit the population by maintaining public order and protecting normal economic intercourse, on the one hand, and measures of a political complexion designed to hurt the enemy, on the other, appears to offer a more adequate and practical criterion for the decision of such cases.

Although the impact of our changed notions regarding the lawfulness of war on the international law of belligerent occupation must, thus, be cushioned by the recognition of practical necessities, we should in the future be less inclined to attach presumptive validity to the acts of an occupant than has been advocated in the past by some authorities. Hyde, for instance, characterizes as "dangerous" the doctrine that the legitimate successor to the occupant is not bound by measures of the usurper which are repugnant to the successor's own notions of public policy.[1] It would seem that great leeway should be given to the successor regime and its courts in enforcing or repudiating laws enacted

[1] Hyde, *International Law*, 2d edition, 1945, p. 1885; *cf.* also Oppenheim, "The Legal Relations between an Occupying Power and the Inhabitants," 33 L.Q.R. (1917) 363, 364, 367.

by the occupant. McNair's view that the belligerent occupant has the right to make all regulations "necessary to secure the safety of his forces and the realization of the legitimate purposes of the occupation," and that "the morality or immorality of the occupation is irrevelant," would also appear to be in need of qualification.[2]

As Judge Ritter points out in *Aboitiz & Co. v. Price*, the occupation of the Philippines, being an act of unprovoked aggression, "could have no legitimate purposes which Japan was entitled to realize" (*loc. cit.*, p. 612). This statement, as well as the general tests used in this case to determine the legality of the Japanese occupation measures, suggest a constructive approach to a re-evaluation and revision of the law of military occupation in the light of recent developments in international law.

EDGAR BODENHEIMER

AUSTRIA: CONFISCATION OF PARTNERSHIP (*offene Handelsgesellschaft*) IN COUNTRY OF REGISTRY; NO EFFECTS ON ASSETS LOCATED ABROAD.—The facts of a case decided by the Austrian Supreme Court on May 31, 1951, (L.v.R.,F. intervening—not reported), were as follows: Before 1938, three Czechoslovak citizens formed a partnership (*offene Handelsgesellschaft*) under Czechoslovak law and registered it in B., Czechoslovakia. In 1944, this firm delivered goods to R., an Austrian, domiciled in Vienna. These goods were not yet paid when the three partners were expelled from Czechoslovakia at the end of the war. Their firm was nationalized under Czechoslovak law and all its assets transferred to F., a Czechoslovak national enterprise. The partners found refuge in Austria and subsequently tried to collect the debt, which R. owed to the partnership. For this purpose, two of the three partners assigned their rights to this debt to L., the third partner, who claimed the debt in his own name. R. refused to pay alleging that he owed the debt to the partnership as a whole and not to the partners individually. As the Czechoslovak national enterprise F. had become the legal successor of the partnership under Czechoslovak law, R. considered that F. and not L. should be entitled to collect the debt. F. intervened to confirm this point of view. The Court held that the Czechoslovak confiscatory legislation has no effect on the assets of the partnership located in Austria. The Court, however, took notice of the fact that the partnership had been dissolved in Czechoslovakia. The Court stated that the Czechoslovak confiscatory measures had brought the partnership to an end, but as these measures did not provide for the winding-up of the partnership, those of its assets which were located in Austria became the personal property of the former partner. The Court referred to an unreported decision of the Austrian Supreme Restitution Commission of September 2, 1950, according to which such property of a dissolved (Austrian) partnership that had not been included

[2] McNair, *Legal Effects of War*, (1944) pp. 321, 322, 337.

in the winding-up of the partnership, automatically became the personal property of the former partners. L. was therefore held entitled to collect the debt.[1]

IGNAZ SEIDL-HOHENVELDERN

PUERTO RICO: INVALIDITY OF FOREIGN WILL DISPOSING OF REAL PROPERTY IN PUERTO RICO; *LOCUS REGIT ACTUM* NOT APPLIED—In an action to set aside, on the ground of fraud, deeds made by the decedent, plaintiff claimed to be the decedent's universal heir under a sacramental will duly executed and probated in Barcelona, Spain, decedent's domicile. The District Court of Puerto Rico dismissed the complaint on the ground that the plaintiff had no standing in court, the Barcelona will being held ineffective to dispose of real property in Puerto Rico. Affirmed. *De los Angeles Melon v. Entidad Provincia Religiosa*, 189 F. 2d. 163 (C.A. 1, 1951).

The Court of Appeal felt bound to follow the decisions of the Supreme Court of Puerto Rico as to Puerto Rican law. These decisions, the Appeal Court said, laid down the rule that the *lex rei sitae* determines not only the validity and effect of wills disposing of real estate in Puerto Rico, but also the formalities of execution and the capacity of the parties. There is no warrant in the Puerto Rico cases cited by the Appeal Court, not even a dictum, for including in this statement the formalities of execution. One of the three cases cited dealt with the capacity of a guardian; the second case had nothing to do with the form of a will; in the third case, on which the Appeal Court placed most reliance, a Spanish court had in an *ex parte* proceeding admitted to probate letters of decedent as a holographic will but expressly "without prejudice to third parties"; the Puerto Rican court quite properly held that the letters did not constitute a holographic will; it did not discuss section 11 of the Civil Code.

The decision flies in the face of the principle of *locus regit actum* expressly and emphatically adopted by section 11 of the Puerto Rico Civil Code, this provision being a copy of the Spanish Code, viz: that the forms and solemnities of contracts, wills, and other public instruments are governed by the law of the country in which they are executed. The reasoning to avoid section 11 is inconclusive and unsound. In the instant case it was held that the requirement that nuncupative wills must be made before five competent witnesses (Civil Code (1930) s. 650) must be strictly complied with. Clearly, this section was not intended to have any extraterritorial effect; under sections 625 and 626, wills executed in foreign countries are special wills, governed by section 11 (*locus regit actum*). The rule of *locus regit actum* for external formalities, it is submitted, is the only sound one in view of international exigencies. The distinction, in its application, between realty and personalty should not exist. The modern tendency as evidenced by numerous codes and statutes as to wills

[1] A partnership (*offene Handelsgesellschaft*) has no legal personality under either Austrian or Czechoslovak law. Therefore, the solution in this case cannot be applied as it stands to companies to which the law ascribes legal personality.

is against it. Section 11 makes no distinction. The decision is contrary not only to the express language of section 11, but to the well-established law in Spain and Cuba where the same provision exists.*

The case is of interest also to the comparative lawyer as showing the survival of the ancient *fueros* or local laws in Spain. The Civil Code of 1889 did not unify the whole Spanish law; the local *fueros* were left in force in many matters. The will in question was executed and probated pursuant to a Barcelona *fuero* or charter of the year 1283, whereunder for a nuncupative will *in extremis* only three witnesses are required. As showing the necessity of the rule *locus regit actum*, how, as a practical matter, could the testatrix, or her advisers, be acquainted on short notice with the Puerto Rican law?

P.J.E.

SWITZERLAND: DUTY OF FATHER TO SUPPORT ILLEGITIMATE CHILD—In common law countries, duties of support are imposed generally by the state of the domicile of the person liable to provide support or by that of the person to be supported, provided the person liable is subject to the jurisdiction of such state.[1] Conversely, except as may be provided by statute, no state will directly enforce a duty to support created by the law of another state.[2]

It has often been said that the father of an illegitimate child is under a moral obligation to support it,[3] but at common law this duty cannot be enforced, the bastard being *filius nullius* and left in the charge of the parish where he was born.[4] With a view to indemnifying the parish for the cost of maintenance and, incidentally, to discourage vice, the English Poor Law Act of 1576[5] put the duty of providing maintenance on both parents. Later the duty was put on the father primarily, and the mother or the overseer of the poor was given the right to institute paternity proceedings for the child's benefit. Nevertheless, the English Bastardy Act of 1872,[6] as well as most of the American bastardy statutes, which are generally based on the Elizabethan statute, are to be considered part of the poor laws, closely related to administrative law.[7, 8] The

* Trías de Bes, Derecho Internacional Privado (1932) 47 *et seq.*; 2 W. Goldschmidt, Sistema y Filosofía del Derecho Internacional Privado, (1949) 258, 510, 522; 1 Bustamante, Derecho Internacional Privado (1931) 433 *et seq.*; 1 Nuñez, Código Civil (1934), under article 11.

[1] Restatement, Conflict of Laws (1934) §457.

[2] Coldingham Parish Council v. Smith [1918] 2 K.B. 90; Restatement, Conflict of Laws (1934) §458; *cf.* Restatement, Conflict of Laws (1934) §462 for alimony.

[3] Roy v. Poulin, 105 Me. 411, 74 Atl. 923 (1909); Burton v. Belvin, 142 N.C. 151, 55 S.E. 71 (1906).

[4] Robbins and Deák, The Familial Property Rights of Illegitimate Children: A Comparative Study, 30 Col. L. Rev. (1930) 308, 316.

[5] 18 Eliz., c. 3.

[6] 35 & 36 Vict., c. 65.

[7] Martin Wolff, Private International Law (2nd ed. 1950) 174, 407.

[8] The bastardy statute of Illinois, Ill. Ann. Stat. c. 17 (Smith-Hurd) may be called typical for this kind of legislation in the United States. Alaska, Idaho, Texas, and Virginia do not have

duty of the father is enforceable in a special proceeding which in most states has been called quasi-criminal.[9] But no legal duty rests upon him until a bastardy order is made.[10]

Since a duty of the father to the public rather than a personal right of the child is to be enforced, the *lex fori* will be applied.[11] Some older decisions have held that, since indemnification of the parish is the main purpose of the bastardy statutes, a court has no jurisdiction where the child is not a resident.[12] In England it is required, in addition, that the child shall have been born in England or at least to a mother domiciled in England.[13] However, the majority of American courts, saying that the bastardy statutes are primarily designed for the benefit of the child, show a trend also to assume jurisdiction in cases where the child is not a resident.[14]

While the Anglo-American judge has to pass only on the question of jurisdiction, the judge of a civil law country is faced primarily with the problem of choice of law. Most laws give the illegitimate child an inherent right to support by virtue either of birth (Germanic system) or of recognition (Roman system), enforceable by a civil action. Under German and Swiss laws, the difficulty of ascertaining paternity is remedied by the rebuttable presumption that a man who has sexual intercourse with the mother during the period of conception is the father of the child.[15] The French statute of November 6, 1912, has modified the famous rule "la recherche de paternité est interdite"[16] to the effect that in cases of rape, seduction, or concubinage inquiry into fatherhood is permitted. In other cases, the father is liable to maintain the child only if he has recognized it.[17] Under Swiss law, recognition by the father[18] gives the child a right to support as a legitimate child, taking the father's name and nationality.[19]

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any legislation for the benefit of illegitimate children; seven states have adopted the advanced provisions of the Uniform Illegitimacy Act; Arizona has granted the illegitimate child the same legal position which a legitimate one has, Code 1939 s. 27–401. Between the two extremes every imaginable shade is to be found.

[9] E. Dicks v. U. S., 72 A. 2d 34 (D. C. Mun. App. 1950); Kanorowski v. The People, 113 Ill. App. 468 (1904).

[10] Wolff, *op. cit., supra* at 407.

[11] Restatement, Conflict of Laws (1934) §454; Wolff, *op. cit., supra* at 407.

[12] Sutfin v. People, 43 Mich. (1880) 37, 4 N.W. 509.

[13] Tetau v. O'Dea [1950] 2 All Eng. Rep. 695; R. v. Humphries [1914] 3 K.B. 1237; R. v. Blane, 13 Q.B. 769 (1849).

[14] Kolbe v. People, 85 Ill. 336 (1877); McGary v. Bevington, 41 Ohio St. 280 (1884); Moore v. State, 47 Kan. 772, 28 Pac. 1072, 17 L.R.A. 714 (1892); State v. Pickering, 29 S.D. 207, 136 N. W. 105 (1912); People v. Graft, 170 Ill. App. 369 (1912); *In re* Zimmer, 64 N.D. 410, 253 N.W. 749 (1934); The Uniform Illegitimacy Act contains a special provision to that effect; Restatement, Conflict of Laws (1934) §455; Adams v. Adams, 272 App. Div. 29, 68 N.Y.S. 2d 294 (1947)

[15] §1717 Bürgerliches Gestzbuch (B.G.B.); art. 314, Zivilgesetzbuch (Z.G.B.).

[16] Art. 340, Code Civil.

[17] *Cf.* Louisiana Civil Code, art. 245.

[18] Which is excluded for *adulterini* and *incestuosi*, art. 304, Z.G.B.

[19] Art. 325, Z.G.B.

A peculiar Swiss proceeding called "Zusprechung mit Standesfolge", which is admissible in cases of breach of promise, sexual offense against the mother, or abuse of her dependence,[20, 21] has the same effect. Consequently, in the fields of conflict of laws, the civil law regards matters of support as related to the circumstances of the case and the personal law of the persons concerned rather than to the public policy of the forum. As Martin Wolff says,[22] every imaginable point of contact has been recommended by legal writers, considered by courts, and introduced into modern codes.

In the recent case of *Remund v. Klein*[23] decided by the Swiss Bundesgericht (BG), a Swiss Citizen, Martha Remund, while employed in France, conceived a child by a French citizen, Charles Klein. The child was born in January, 1948, after Martha had removed to Switzerland.

By art. 312 ZGB, jurisdiction in paternity proceedings is vested in the courts of the domicile either of the plaintiff child at the time of birth or of the defendant at the time of suit.[24] The BG confirmed its previous rulings that the *lex domicilii* of the father at the time of conception governs his duty to support his illegitimate child.[25] In other words, the Swiss conflict rule refers the matter to the personal law of the father (as Spanish, Danish, and Baltic laws do) as the appropriate system to decide whether, under what conditions, and to what amount his obligation exists. French and Polish laws, and the Código Bustamante prefer the personal law of the child, since it is from the child's status that the obligation arises.[26] Under German[27] and Czechoslovak law,[28] which seek to apply the same law—this is presumably that of the child too—to the duty of both parents, the father's duty to support is governed by the personal law of the mother. Since it is not likely at the time of conception that the father has elected his domicile with a view to avoiding the duty of support, Swiss law prefers the *lex domicilii* at that time, though it is difficult to ascertain. German and Italian laws choose the time of birth, since that is the time when the obligation arises.

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[20] Art 323, Z.G.B.

[21] *Cf.* the compilation of rules concerning illegitimacy in Tomforde, Das Recht des unehelichen Kindes und seiner Mutter im In- und Ausland, 3rd ed. (1930).

[22] *Op. cit., supra,* at 404.

[23] Entscheidungen des Schweizerischen Bundesgerichts, vol. 77, part II, (1951) p. 113, (BGE 77 II 113).

[24] The BG did not mention whether the defendant—a domiciled Frenchman—had submitted to the jurisdiction of the court. Thus the judgment possibly will not be recognized by Anglo-American courts.

[25] BGE 45 II 507; 51 I 105; 53 II 89; For questions of personal status apart from support, like recognition, adoption, Zusprechung, etc., art. 8 of the Bundesgesetz betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter vom 25. Juni 1891 (NAG) refers to the *lex patriae* of the father.

[26] See Wolff, *op. cit., supra,* at 405.

[27] Art. 21 Einführungsgesetz zum BGB (EGBGB).

[28] Raape, Commentary on EGBGB (in Staudinger's Commentary on BGB, 9th ed.) (1932), art. 21 J I 2, p. 538, art. 21 J II 4, p. 539.

Following the above conflict rule, the court of second instance (Obergericht des Kantons Baselland) dismissed the action since under French law the plaintiff, having not been recognized by his father, was not entitled to support. By appeal to the BG, plaintiff sought to have Swiss law applied by way of renvoi. The BG did not decide whether, in a case of a foreigner living in his own country, the renvoi doctrine should be applied nor whether there is a French conflict rule referring the matter to the child's *lex patriae*[29] but refused to review the judgment on these grounds since the jurisdiction of the BG, the only federal court, is limited to matters of Swiss law.[30] Thus the question of renvoi was considered a matter of French law rather than of Swiss conflict of laws. Nor was this deemed a question of fact and as such not subject to examination by the BG, on *revisio in jure*.[31] It is suggested that—if renvoi is to be accepted—foreign conflict rules should be subject to review by higher courts, since neglect of a foreign conflict rule is a violation of the domestic conflict rule which accepts renvoi.[32] On this very important and controversial point, the opinion deserves a more detailed discussion than space permits here.

Finally, plaintiff objected to application of French law for reasons of public policy, but the court denied that the French law of illegitimacy is inconsistent with the public policy of Switzerland. It observed that the rule of public policy should not be used in order to extinguish differences of laws simply because Swiss law is more favourable to illegitimate children. There are so many arguments for and against the restriction of paternity proceedings that the solution found by Swiss law cannot be asserted to be the only acceptable one. For instance, even Swiss law forbids paternity proceedings against a married man.[33] Some German courts have taken the opposite view. They have justified the application of German law on grounds of inconsistency with "the purpose of a German legal rule" in cases where the governing Rumanian law prohibited inquiry into fatherhood.[34] But it should be mentioned that in those cases both parents were residents of Germany and the child, though a foreigner, would have had to be supported as a casual indigent.[35] French courts do not object

[29] Which, in fact, seems to be settled: Cour de Cassation (cass.) Nov. 3, 1938, Nouvelle Revue de Droit International Privé (Nouv. Rev.) 839; cass. March 5, 1935, Revue critique de droit international et de législation comparée (Rev. crit) 775; cass. June 21, 1935, Nouv. Rev. 548, Journal de Droit International (J. Clunet) 1936, 872; *cf.* Raape, *op. cit., supra*, J II 1, p. 538/9.

[30] BGE 75 II 283.

[31] On the question, see Wolff, *op. cit., supra* at 223.

[32] See German Reichsgericht (Off. coll.) 136, 361; *cf.* Raape, *op. cit., supra*. Introduction K II 4 a, p. 47; Schnitzer, Handbuch des Internationalen Privatrechts (2nd ed. 1944) 173 *et seq.*

[33] Art 323 (2) ZGB.

[34] Art 30 EGBGB distinguishes between foreign rules which would, if applied, produce a result contrary to *boni mores*, and those which, though unobjectionable as such, would entail an inconsistency with the purpose of a German legal rule. See Wolff, *op. cit., supra* at 170.

[35] Oberlandesgericht Hamburg in Juristische Wochenschrift 1936, 3492; Oberlandesgericht Posen in Deutsches Recht 1944, 82; see Raape, *op. cit., supra* at art 30 H II 1, p. 820. *Contra:*

to Islamic law, which in no case allows inquiry into fatherhood,[36] nor to other laws less favorable than French law.[37] On the other hand, French courts do not enforce foreign claims which go beyond those admissible under French law.[38] This may be due to the procedural character of the rule "la recherche de paternité est interdite", which is to be regarded as an expedient means to bar scandalous proceedings rather than as a denial of the father's duty to support his illegitimate child. A similar provision is contained in art. 21 EGBGB, according to which a German father cannot be held liable to support his foreign illegitimate child beyond his duty under German law. To this extent, application of foreign law is excluded.

An identical problem arises in common law countries when a foreign support order is to be enforced. In the United States it has been held that the fact that the cause of action is unknown to the law of the forum is no sufficient reason to refuse recognition of a judgment of a sister state.[39] But also, in a case where the foreign claim was repugnant to the public policy of the forum, enforcement of such order has been denied.[40] Thus, the right of an illegitimate child under Maltese law to claim perpetual maintenance against its father was regarded by an English court as contrary to public policy and recognition of the Maltese judgment was refused.[41] The objection of a New York decision[42] that the bastardy order is of penal character should be of no great significance since the bastardy statutes have been qualified as essentially civil though in part criminal as to procedure by most of the courts. There are doubts, however, whether the enforcement of a foreign bastardy order obtained by a state or welfare official would be refused because the claim might be called a fiscal one. It is suggested that the right of the child and the necessity to support it should be given preference to objections to details of procedure.

HARTMUT F. LÜTHKE

Application of The Sherman Act to International Combinations

For approximately fifteen years American courts have tried to bring American business into line with "the declared policy [open market] of the United States

Landgericht Hirschberg, Zeitschrift für ausländisches und internationales Privatrecht (Rabel's Z.) 1929 No. 86; Landgericht Frankfurt, Rabel's Z. 1932 No. 93; Reichsgericht July 17, 1943, Zeitschrift der Akademie für Deutsches Recht 1944, 67, with note by Raape.

[36] Casablanca March 19, 1937, Rev. Crit. 1938, 264.

[37] Cass. July 28, 1925, Revue de Droit International Privé 458; see Schnitzer, *op. cit., supra* at 399.

[38] Cass. March 26, 1935, J. Clunet 1936, 399.

[39] Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. ed. 1039 (1908).

[40] De Brimont v. Perriman, 10 Blatchf. 436 (S.D.N.Y. 1873); duty of father-in-law to support son-in-law according to French Law (art. 206. 207 C.C.).

[41] *In re* Macartney, Macfarlane v. Macartney, [1921] 1 Ch. 522. But *cf.* Burchell v. Burchell, 58 Ont. L.R. 515 (1926): Ohio decree granting alimony to a husband recognized by the Canadian Court.

[42] Matter of Neinig's Estate, 108 N. Y. S. 478 (1908); but *cf.* Stone v. Helmer, 21 Iowa 370 (1866); Stanfield v. Fetters, 7 Blackf. 558 (Ind. 1845).

which has afforded it protection and whose laws have permitted and encouraged its great growth and prosperity."[1]

A recent decision (*United States* v. *Imperial Chemical Industries*, 100 F. Supp. 504 S.D.N.Y., 1951), is a further link in the chain of cases outlawing certain practices in the co-operation between domestic and foreign firms.

The government brought a suit in equity against an American and an English combine. On the American side the defendants were E. I. DuPont de Nemours (DuPont), Remington Arms Co., Inc. (Remington), and two of the officers of these corporations. (Since 1933 Remington has been controlled by DuPont). On the British side the defendants were Imperial Chemicals Industries, Ltd. (ICI), organized under the laws of the United Kingdom, and its American agent, Imperial Chemicals Industries (New York) Ltd. (ICINY). ICI was organized in 1926 by a merger of a number of large firms, e.g., Noble Explosives, Ltd., British Dyestuff Corporation, Ltd., Brunner-Mond & Co., and United Alkali Co. Ltd.[2] It has a capitalization of seventy-five million pounds sterling.

The Government, proceeding under sections 1 and 4 of the Sherman Act,[3] asked that a long list of contracts be declared invalid and that all relief necessary to prevent the reoccurence of the alleged unlawful co-operation of the combines be granted.

The principal factual allegation was that the defendants, partly in co-operation with others, especially I. G. Farben of Germany, divided the world market, at the beginning in explosives, later in almost all chemicals. It is alleged that this aim was pursued by several devices: (1) straight contract; (2) arrangement of patent rights (ownership and licenses) to the effect that the performance of the contract (under 1) was secured between the parties and any interference of third groups was excluded effectively; (3) jointly owned subsidiaries of the parties, partly co-operating with local firms, which split the local profit, made in their area among their shareholders according to the general program of division of market.

The relationship started with an open contract for division of markets without any artificial patent or similar support. In 1897 an agreement between DuPont, ICI, and a German firm in regard to different types of explosives was reached.

"... most pertinent to this suit are those involving high explosives—as to which it was agreed that the United States of North America with its present and future territories—as well as the Republics of U. S. of Colombia and Venezuela are to be deemed the exclusive territory of the American factories ... All the countries in South America not above mentioned as well as British Honduras and the Islands in the Caribbean Sea which are not Spanish possessions are to be deemed common territory, ... the rest of the world is to be the exclusive territory of the European factories, ... The Dominion of Canada and the Islands appertaining thereto as well as the Spanish possessions of the Caribbean Sea are to be a free market unaffected by this agreement."

[1] 100 F. Supp. 504, 591.

[2] *Id.* at p. 408.

[3] Antitrust Act of July 2, 1890, c. 647, 26 Stat. 209.

This 1897 agreement was cancelled by the parties in 1906, one year before the filing of the government monopoly suit against DuPont, which resulted *inter alia* in its judicial condemnation in *United States* v. *E. I. DuPont de Nemours & Co.*, ((CC 1911) 188 Fed. 127).

The student of international cartel development cannot be surprised to learn that the parties tried to make legal by agreements respecting patents and processes what was otherwise illegal. In 1907 an agreement as to explosives was reached providing for "the exchange of patented and secret processes; each granted to the other exclusive rights for the grantee's territory and non-exclusive rights in all other territories." Under this new division of market based on patents, some territories remained exclusive—others non-exclusive—the territories basically following the contractual geographical division of 1897. No royalties were demanded for any patent. It was a straight division of market of exchange of patents.

The technological needs of a progressive period called for continuous exchange of information. DuPont argued that this exchange of information was the actually important part of the agreement, while the division of market was accidental. In 1913 the agreement was cancelled again under the threat of an antitrust proceeding. In 1913 a new agreement was prepared but not executed during World War I. A private memorandum of Lamont DuPont, 1919, describes the policy of DuPont as follows:

> "He embraced within the projected policy four categories of products: one, explosives, accessories and ingredients; second, artificial leather; third, dyestuffs and intermediates; and fourth, all other products. With respect to each of these categories three distinct trade areas were proposed—the three areas are designated: (1) active territories—territory where DuPont or subsidiaries expect to and will endeavor to become the leading source of supply; (2) representative territory—territory where DuPont Company or subsidiaries expect to do business now or later but do not expect to become the leading seller; (3) inactive territory—territory where DuPont Company or subsidiaries do not expect to do any business and will not attempt to supply in any way. Inactive territory includes all in which we have given to other manufacturers through agreements exclusive rights to our own patents and processes."[4]

In 1920 the agreement of 1913 was repeated, this time however, exclusively between the American and British firms. Between 1920 and 1929 more and more fields of business were included in the scope of co-operation; in large fields of the chemical industry, DuPont obtained a promise to receive exclusive licenses on ICI patents in consideration for the grant of exclusive licenses on its own patents in certain other territories. "With a few exceptions, principally rayon, cellophane and products of the general alkali industry, the agreement covered substantially all of the chemical products made by the two companies." In regard to major inventions, it was provided that "adequate and justifiable compensation should be agreed upon by separate negotiations".[5] In 1939, "substantially the provisions of the 1929 agreement were incorporated into the

[4] 100 F. Supp. 504, 519.

[5] *Id.* at p. 550.

new agreement with a few alterations introduced principally for antitrust reasons".[6]

In regard to a number of countries, especially Argentina, Brazil, and Canada, joint subsidiaries were established which operated as instruments of a contractual arrangement between the two combines.

The first problem confronting the court is of special interest for the practice of international trade law: the problem of jurisdiction over the British combine ICI. The court followed a former ruling of Judge Leibell in *U.S.* v. *United States Alkali Export Ass'n, Inc., et al.* (unpublished opinion, S.D.N.Y., 1946) regarding jurisdiction of the federal court of New York over ICI. The problem was whether a service of process upon ICI in London could be made by delivery to the treasurer of ICI, N.Y., of a copy of the complaint and a summons directed to ICI.

The Government alleged in the *Alkali* case that "the function of the New York corporation is to act as a general representative of ICI London in the United States on matters of policy." A former president of the New York company appointed, employed, and controlled by ICI had described its task as being "a highly specialized private commercial legation." He called himself ICI's North American ambassador. The principal points on which the district court based its jurisdiction over ICI London on the basis of service made to ICI New York are the following: (1) ICI New York conducted "negotiations and discussions as a medium or liaison between ICI London and U.S. concerns." The New York corporation became especially active in the discussions with DuPont in regard to the interpretation of the above discussed patent and process agreements between DuPont and ICI. (2) ICI New York is chartered "to act as buying and selling agent in the United States of America for ICI Ltd." In fact it acted basically as buying agent for ICI and its affiliated companies. (3) ICI New York was financially and otherwise under continuous control of ICI London.

The decision of the court is highly realistic and adapts old principles on jurisdiction to modern economic needs. Almost every big foreign combine maintains in the United States a similar incorporated ambassador. Nothing can be more certain than that all letters received by the ambassador become known to the foreign combine. There can be no better service to the foreign combine than service to the incorporated ambassador.

The court refers to *International Shoe Company* v. *State of Washington*, 326 U.S. 310 (1945). The facts of the two cases are rather different, since the *International Shoe* case did not involve the problem of a subsidiary corporation. Indeed, we have here a new and progressive development in the field of jurisdiction over foreign firms.

On the merits of the case, the court followed the rules prepared by the former decisions.[7] The court comes to the following conclusion: (a) in regard to limita-

[6] *Id.* at p. 541.

[7] U.S. v. National Lead, 63 F. Supp. 513, aff'd 332 U.S. 319 (1945); U.S. v. Minnesota

tions on co-operation of United States and foreign firms: (1) as to contracts: "We have found that the various patents and process agreements were made in furtherance of the conspiracy alleged. These agreements irrespective of their *per se* legality were instruments designed and intended to accomplish the worldwide allocation of markets—in the face of this finding the law is crystal clear: a conspiracy to divide territories which affects American commerce violates the Sherman Act—So settled is the law on this that in the *National Lead* case, *supra*, Judge Rifkind wrote: 'No citation of authority is any longer necessary to support the proposition that a combination of competitors which by agreement divides the world into exclusive trade areas and suppresses all competition among the members of the combination, offends the Sherman Act.' "[8]

(2) As to joint subsidiaries: "We have found that the jointly owned companies were means designed and used by DuPont and ICI to avoid and prevent competitions between themselves and with others in the non-exclusive territories. They were a means used for the accomplishment of the basic understanding for the division of world-wide territories."[9] (3) As to patents, the court comes to the general finding that patents were a camouflage for a world-wide execution of the original agreement on the division of markets.

(b) In regard to permissible co-operation: "It is settled that joint manufacturing ventures even in domestic markets are not made unlawful *per se* by the Sherman Act but become unlawful only if their purpose or their effect is to restrain trade or monopolize it. It is also clear that absent this wrongful purpose or harmful effect, there is nothing *per se* unlawful in the association or combination of a single American enterprise with a single local concern of a foreign country in a jointly owned manufacturing or commercial company to develop a foreign local market."

The legally most important problem of this case is to be taken care of later: the formulation of the final judgment. The government asks, *inter alia*, that the Court make ineffective the instruments of the unlawful co-operation: United States and foreign patents of DuPont and ICI as well as the participation of the two combines in the jointly owned foreign subsidiaries.

A number of important problems of private international law are hereby raised.

1. Is the jurisdiction *in personam*, which the District Court has over ICI sufficient to justify a decree relating to ICI's behavior abroad?

2. Is it relevant here that under the law of the foreign countries involved, especially England, the behavior of ICI has been perfectly lawful?

3. Does the rule of the *American Banana Co.* v. *United Fruit Co.* case, 213 U. S. 347 (1909) in any way interfere with the power of the District Court to order DuPont and ICI to dispose of their interests in foreign countries?

Mining and Manufacturing Company, 92 F. Supp. 947 (1950); U.S. v. Timken Co., 83 F. Supp. 284, aff'd 341 U.S. 593 (1951).

[8] 63 F. Supp., at page 523.

[9] 100 F. Supp. 504, 592.

It is too early to comment on these questions here. The same problems came up in connection with the formulation of the final decree in the case *United States* v. *General Electric* (Trenton), 82 F.Supp. 753 (D.N.J., 1949), in which case the Dutch combine Philips was a defendant. The government asked the court to enjoin Philips from enforcing its foreign patents in a way inconsistent with the purpose of the decree. The Netherlands Government raised objections in Washington. It should be helpful to quote from a letter of the United States Department of Justice to the United States State Department dated August 24, 1951, in this matter:

"We endeavored to make it clear to the representative of the Netherlands Embassy that the only remedy being sought against Philips which would relate at all to its patents owned abroad was one designed, by *in personam* action on Philips in the United States, to prevent Philips from defeating the judgment. Thus, the judgment would direct Philips to dedicate or license United States patents misused by it. Domestic licensees under these patents must be free to ship products, manufactured by use of the patents, as part of the foreign commerce of the United States. Such freedom would not exist, however, if Philips could prevent importation of such products into foreign countries by use of its counterparts of the United States patents in such foreign countries. Therefore, Philips is required to refrain from defeating the primary obligation to dedicate or license its United States patents, by granting an immunity under the counterparts held by it abroad to licensees in the United States."

I shall discuss these questions on another occasion.

H.K.

Protection of Designs: United States and French Law

Particularly in the field of the *haute couture*, the legal protection of industrial designs, patterns, or models, presents special problems. As a practical matter, it would be difficult, if not impossible, to secure a patent upon each item of fashion—indeed many such items are umpatentable.[1] Assuming the existence of a patentable item, the problem of protection remains, for articles of fashion have in general a very short life and may even lose their value in the course of a single season. Thus, producers and owners of such articles must look to other means than patents for the protection of their interests in these creations which embody so much ingenuity and material investment. A comparison of a recent French case with a leading decision in the United States, will illustrate the differences both with respect to reasoning and in the result, which characterize the treatment of this problem in French and American courts. The French statute of 1793, amended in 1902, provides in France effective protection for "intellectual and artistic property"[2]; American courts rely on common law concepts and as a result have denied relief in many cases[3].

[1] The same difficulty exists with respect to copyright, under the Copyright Act (17 U.S.C.A. 1 *et seq.*). See dictum of Judge L. Hand in Chaney Bros. v. Doris Silk Corporation 35 F. 2d 279 (2d Cir. 1929), holding that dress patterns are not subject to copyright [Kemp and Beatley v. Hirsch, 34 F. 2d 291 (E. D. N.Y. 1929)]. See also Verney Corporation v. Rose Fabric Converters Corporation, 87 F. Supp., 802, 83 P.Q. 386 (S.D. N.Y. 1949).

[2] Art. 1382, French Civil Code of 1804.

[3] See, for a comparison of French, American, German, and Swiss cases, Wolff, "Is Design

In the recent French decision, the Société Rose Valois had obtained from a designer the exclusive right to produce a particular model of woman's straw hat. Several months later, the designer sold the same model, with a license to manufacture, to a second producer. The Société Rose Valois requested and induced the police authorities to seize the model sold to the second producer[4], and commenced suit against both the designer and the second producer before the Commercial Tribunal of the Seine to recover damages in the sum of 1,500,000 francs on account of fraudulent initation and unfair competition[5]. Plaintiff recovered solely on the basis of his property interest in the model, the court holding (December 8, 1950) that "Models of high fashion artistic in character with respect to their originality and execution, are protected by the statutes of July 19 and 24, 1793, on literary and artistic property, and by succeeding laws in the same field." Originality and artistic character must be judged by taking into account many elements: trimmings, form, raw materials, and so forth. A counterfeit object must not be judged solely on the basis of its differences from the original object, but rather with emphasis on their similarities. Even though a model is not registered[6], both the designer which sells to a producer exclusive rights in a model and the second producer which knowingly buys and itself manufactures from the same model are guilty of fraudulent imitation and unfair competition, the purpose being to protect the interest which the first producer has in such intellectual and artistic property. The defendants therefore were held liable to refund the damages caused by their unlawful behavior[7].

Piracy Unfair Competition?", 23 Pat. Off. Soc. J. (1941) 431. However, the author fails to point out (at 431) that in France protection is granted by the courts on the ground of unfair competition even in the absence of "passing off", simply because the design or model is considered an object of intellectual and artistic property. See also Benjamin, "Is Design and Construction 'Piracy' Unfair Competition?", *id.*, at 862, taking issue especially with Mr. Wolff's interpretation of German law. With respect to the English law, see White, Trade Marks and the Law of Unfair Competition (1951) at 53 *et seq.*

[4] Seizure is authorized by article 3 of the statute of 1793 in combination with art. 1 of statute of 25th of Prairial (an III).

[5] The decision has been found reported only in Il Diritto di Autore (1951) 72. The fact that in this case the Société Rose Valois is not the designer but only the owner of a right to exclusive production does not decrease the illustrative value of the decision. French courts have similarly decided cases in which the party damaged by fraudulent imitation was the creator of the model. See note 7, *infra.*

[6] In France, models can be registered under the statute of March 21, 1909. Courts have held that a model must be registered according to the provisions of this law and cannot be protected on the ground of the statute of 1793, "If the industrial result is inherent in the form in such a way that it would change if the form or aspect were modified." Such models are considered like inventions, and not like models capable of being protected as intellectual and artistic property objects. (Trib. Civ. of Strasbourg, 24 November 1950, Ann. 1951, p. 39). See also, Trib. Civ. of the Seine, 15th November 1950, *id.* at 35; Trib. Civ. of Lyon, 17th April 1950, and other citations in Ann. 1950, p. 270; and Trib. Comm. of the Seine, 24th April 1947, Ann. 1947, p. 140. (Ann. = Annales de la Propriété Industrielle, Artistique, et Littéraire).

[7] The present decision represents the latest expression of what clearly seems to be the posi-

In *Chaney Bros. v. Doris Silk Corp.*[8], the plaintiff-appellant, a silk manufacturer, was less fortunate, since it obtained by way of relief only the sympathy of the United States Court of Appeals for the Second Circuit. Chaney Brothers produced at great expense many patterns, some of which attracted purchasers for their qualities of novelty and beauty, but many more of which failed to do so. The Doris Silk Corporation, a competitor, at considerably less expense allegedly copied one of the plaintiff's most successful designs and thus was able to undercut its price. The court, in an opinion by Judge Learned Hand, recognized that "plaintiff had suffered a grievance for which there should be a remedy"[9], but unfortunately "a common law patent or copyright for reasons of justice" does not exist[10]. "Congress might see its way to create some sort of temporary right, or it might not . . . judges have only a limited power to amend the law."[11] Accordingly, the court affirmed the lower court's dismissal of the bill for an injunction *pendente lite*. Since the elements of "passing off" were lacking, plaintiff could secure no relief for unfair competition. There was apparently no intention on the part of the defendant to confuse the public with respect to the source of the design. Defendant had only copied a design which the customers much appreciated, put it on the market at a reduced price as

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tion of the French courts in this field. Several requirements for the protection of designs can be inferred from the various decisions:

a) Although the model or design must possess some elements of novelty and originality, it is not necessary that there be an esthetic intent (Court Paris, 17th July 1936, Ann. 1937, p. 224; *contra*, Court Paris, 3rd May 1948, Appeal from sentence of Trib. Civ. Seine, 2nd July 1943, Ann. 1950, p. 253. It is pointed out in a footnote to the latter case, however, that "Il y a lieu de faire les plus expresses réserves sur une telle exigence, contraire à la jurisprudence la plus classique").

b) There is no fraudulent imitation (*contrefaçon*), if similarities in copies of a single model are accompanied by differences sufficiently numerous to prevent confusion. Court Paris, 9th May 1949, Ann. 1950, p. 53.

c) To show the existence of a fraudulent imitation, it is enough that the model or design is reproduced, entirely or partially on paper or linen, for example, and found in a place used for commercial or industrial purposes in possession of a person who has culpable intention. In such circumstances, the crime of fraudulent imitation is complete, according to the proviso of article 425 of the Penal Code. Court Paris, 11th January 1937, and 6th July 1937, Ann. 1938, p. 227; see also Court of Cassation, 30th March 1938, Gaz. Pal. 17th June 1938, and Ann. 1940–48, p. 344.

[8] 35 F. 2d 279 (2d Cir. 1929), certiorari denied, 281 US. 728 (1930). Plaintiff sought a temporary injunction only during the season "for the designs are all ephemeral" (at 279). See note, 14 Minn. L. Rev. (1930) 537.

[9] *Id.* at 281.

[10] *Id.* at 280.

[11] *Id.* at 281. The same opinion was expressed by Mr. Justice Brandeis in his dissent in International News Service v. Associated Press, 248 U.S. 215, 248 (1918). Compare Callmann, "He Who Reaps Where He Has Not Sown," 55 Harv. L. Rev. (1942) 595, at 612:

"It is the purpose of this article to show that there is no obstacle to judicial action today; certainly the courts should not refuse to act on the sole ground that the problem can be somewhat better handled otherwise, especially in view of their expressed reluctance to allow another agency adequately to deal with the problem."

its own product, and in this way appropriated a portion of the plaintiff's trade value.

In order to protect designs and models which are neigher copyrighted nor patented from unfair competition, the presence of an element of "passing off" is considered essential by the majority of the American courts.[12] However, in cases where the doctrine of unfair competition is not applicable, courts have tried to find in the facts of the case some circumstance to justify their interference on some other established ground: a "scheme of imposition and fraud",[13] a breach of contract,[14] or more generically, "the preservation of a property in the product of the plaintiff's effort and money."[15] Aside from such established grounds, no protection is afforded by the courts. This principle is very clearly stated in the *Chaney Bros.* case: "In the absence of some well recognized right at common law or under the statutes, a person's property is limited to the chattels which embody his invention. Other persons may imitate these at their pleasure."[16] It is true that in earlier cases courts seemed to accord relief without a strict requirement of the presence of an element of "passing off", and protected the exclusive use of designs, ideas and methods, original in character and which have a commercial value.[17] These, however, seem to be instances of

[12] The *Chaney Bros.* case has been consistently followed. See Verney Corporation v. Rose Fabric Converters Corporation 87 F. Supp. 802 (S.D.N.Y. 1949) ("indistinguishable from *Chaney Bros.* case", *id.*, at 804); Unique Art Manufacturing Company v. T. Cohn, Inc., 81 F. Supp. 742 (E.D. N.Y. 1949), *affd.*, 178 F. 2d 403 (2d Cir. 1949) (toy: "the plaintiff's color scheme is thought to be comparable to the design of silk goods in the piece as to which the dismissal of plaintiff's bill was affirmed in Chaney Bros. v. Doris Silk Corp.").

[13] See Montague v. Hickson, Inc., 178 App. Div. 94, 164 N. Y. Supp. 858 (1st Dept. 1907), where the court inferred such "scheme" from the fact that defendant sent someone into plaintiff's store to buy a newly fashioned gown with intent to copy the model.

[14] Telegraphic news agencies have been prevented from using information obtained from a competitor's customers who had contracted to use the information only in connection with their own business, the courts basing their action on the jurisdiction of equity to restrain breach of contract. Hunt v. New York Cotton Exchange, 205 U. S. 322 (1907); Board of Trade v. Christie Grain and Stock Co., 198 U. S. 236 (1905). In a similar case where plaintiff had omitted to make such an express contract, one was implied. Kiernan v. Manhattan Quotation Telegraph Co., 50 How. Pr. 194 (Sup. Ct. N.Y. 1876).

[15] This principle was applied with particular reference to the business of gathering news in International News Service v. Associated Press, 248 U. S. 215 (1918). In the Chaney Bros. case, the court refused to rely on the precedent of the International News Service case, denying that in that case the court "meant to lay down a general principle" (35 F. 2d 279, 280). Also in Supreme Records, Inc. v. Decca Records, Inc., 85 P.Q. 408, 90 F. Supp. 908 (S.D. Calif. 1950) the court observed:

"I do not believe that the Supreme Court intended the decision in International News Service v. Associated Press . . . , to apply to appropriations of a different character. The limitation which other courts have placed upon the case, confining it to newsgathering only, accords with my own interpretation. See Chaney Bros. v. Doris Silk Corp., 35 F. 2d 279 (2d Cir. 1929); R.C.A. Mfg. Co., Inc., v. Whiteman, 114 F. 2d 86 (2d Cir. 1940)."

[16] 35 F. 2d 279, 280.

[17] See Prest-O-Lite v. Davis, 215 Fed. 349 (6th Cir. 1924); Ferris v. Frohman, 223 U. S. 424 (1912). These cases have been cited as instances of absolute protection, *e.g.*, 16 Va. L. Rev.

the first class of cases, i.e., those which rest on some established principle other than unfair competition. Such limited, and above all uncertain, protection in the American law for important modern business interests, seems really inadequate[18], as contrasted with the more liberal recognition of intellectual and artistic property in France.

GIORGIO BERNINI

Torts in Admiralty: United States and French Law

Recovery for wrongful death of passengers on the high seas presents numerous problems in French law,[1] which in this subject matter has been developed

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617 (1929–30), but a careful analysis of the facts seems to contradict this opinion. In Prest-O-Lite Co. v. Davis, complainant manufactured and sold acetylene gas put up in metal tanks of peculiar construction, and also provided an exchange system by which an empty tank could be exchanged for a filled one at small charge. Its gas was sold under the registered trade-mark "Prest-O-Lite", its containers being marked "Prest-O-Lite gas tank". Defendant filled with a competing gas empty Prest-O-Lite tanks which they had acquired and sold to consumers, pasting a paper label thereon from which the purchaser, by close attention, might discover that it was not complainant's gas. The court observed, "complainant's rights are not adequately protected by the affixing of the paper label in question upon packages refilled with Searchlight Gas, stating that the refilled tank contains acetylene gas made by the Searchlight Gas Company and not the Prest-O-Lite Gas" (at 351), and held in favor of complainant. It seems clear that this situation is different from that in the Chaney Bros. case. First, it is at least arguable that in this case the element of "passing off" was present. Second, this is a case of a registered trade mark, which "used upon gas stored in complainant's container, thus indicates acetylene gas prepared and tanked as the complainant prepares and tanks in these specific tanks. It also carried with it the idea of complainant's exchange service" (at 352). With respect to Ferris v. Frohman, dealing with a theatrical production, see *infra* note 18.

[18] This field should not, as is often done, be confused with another broad and confusing segment of this area of the law of competition, i.e., that relating to the protection of a "property" interest in a "spectacle" or "production." See, *e.g.*, the recent case of Metropolitan Opera Assn., Inc. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S. 2d 483 (Sup. Ct. N.Y. Co. 1950), granting a preliminary injunction to prevent the defendant from recording plaintiff's radio broadcast productions without permission. The element of "palming off" was here said to be no longer essential in a suit based on unfair competition; plaintiff had a "property" which equity would protect, despite plaintiff's grant of limited licensing privileges and subsequent broadcast rights to the defendant. A note on this case reflects the same confusion, 20 Ford. L. Rev. (1951) 108. For a recent New York case of the Chaney Bros. variety—and following that holding—see Mavco, Inc. v. Hampden Sales Assn., 273 App. Div. 297, 77 N.Y.S. 2d. 510 (1st Dept. 1948), also reported in 77 P.Q. 62 (1948).

As to the protection of intellectual property in the United States, see Yankwich, "Originality In The Law of Intellectual Property," 11 F. R.D. (1951) 457. The author, however, seems not to have considered the problem discussed in the present note, since he observes (at 482):

"When it is borne in mind that our patent law specifically allows patents for designs, it is quite apparent that commercial art and advertising are amply protected, despite the fact that 'It requires a low degree of originality and artistic or literary merit to constitute an advertisment a proper subject of copyright'. [Ansehl v. Puritan Pharmaceutical Co., 61 F. 2d 131 (8th Cir. 1932) (at 136)].'

[1] On general French maritime law, see Ripert, Traité de Droit Maritime (3 vols.: 3d ed. Paris 1929–1930; 4th ed., vols. 1 & 2, Paris 1950–1952) (hereafter cited as Ripert). The

through the interpretation of the general provisions applicable to torts, as contrasted with the American law which is primarily embodied in the Federal Death Act of March 30, 1920.[2] A recent decision of the Cour de Cassation in the case of the *Lamoricière*,[3] a French ship wrecked by a storm in the Mediterranean on January 9, 1942, with a loss of over 300 lives, is very likely to make the structure of the French law even more complex.[4] As a matter of theory, it is interesting to compare the approach and the development of American and French law; as a matter of practice, however, it should be borne in mind that a right granted by the law of any foreign state may be enforced in the courts of another state.[5]

1. The French and American maritime law on recovery for wrongful death have been developed from their respective general laws of torts. The power, granted to the decedent's relatives by the French law concerning liability for fault,[6] to maintain suits for damages in case of wrongful death,[7] was extended to

French reporters and legal periodicals are cited *infra:* Recueil Dalloz as D.; Recueil Sirey as S.; Gazette du Palais as G.P.; Jurisclasseur Périodique as J.C.P.; Revue Trimestrielle de Droit Commercial as R.T.D. Comm.; Revue Internationale de Droit Maritime as Revue Internationale; Revue de Droit Maritime Comparé as Dor; Le Droit Maritime Français (1923–1940) as Dor Sup.; Le Droit Maritime Français (new series since 1949) as Droit Maritime.

[2] 41 Stat. 537 (1920), 46 U.S.C. §761 (1944). See 1 Benedict on Admiralty (6th ed. 1940) §140; Robinson on Admiralty (1939) §16.

[3] Cour de Cassation, Chambre Civile, June 19, 1951, D. 1951. J. 717 (Note Ripert); R.T.D. Comm., 1951. 822 (Note De Juglart & Chasseriaux).

[4] We shall deal here only with passengers' deaths. As to the seamen see 1 Ripert 601; Robinson at chapter 9; 1 Benedict §141, 142.

[5] 46 U.S.C. §764 (1944). For application of French law see La Bourgogne, 210 U. S. 95 (1908); see also, The Vestris 53 F. 2d 847 (S.D.N.Y. 1931); Sachs v. Italia S.A. di Navigazione, 41 F. Supp. 849. 1941 A.M.C. 1368, (S.D.N.Y. 1941). On the limitation of liability see *infra* note 29 as to foreign shipowners. On the matter of a foreign ship in the American territorial waters, see Robinson §17 at 152. On the French law of conflicts see 5 Niboyet, Traité de Droit International Privé (Paris, 1948) 161.

[6] Construed by the French Courts on the basis of the wide statements of the article 1382, Civil Code (1804); "Any act whatever done by a man which causes damage to another obliges him by whose fault the damage was caused to repair it". On French law of torts see Mazeaud, Traité théorique et pratique de la responsabilité civile (3 vols.; 4th ed. Paris, 1947–1950) (hereafter cited as Mazeaud); Savatier, Responsabilité Civile (2 vols.; 2d ed., Paris, 1951) (hereafter cited as Savatier); Amos and Walton, Introduction to French law (Oxford, 1935) (hereafter cited as Amos-Walton).

[7] The French law of torts admits the possibility of suits for conscious suffering of the decedent between the time of injury and ensuing death (see 2 Mazeaud 758; 2 Savatier 111; Cass. Civ. January 18, 1943, D. 43 J.45; Cass. Civ. January 4, 1944, D. 1944 J. 106), and for the material loss and the moral damage (pain and distress) suffered by the relatives. (See for loss of support 1 Mazeaud 294; 2 Savatier 114; Cass. Crim., July 28, 1933, G.P. 1933. 2. 626, giving damages to decedent's father, mother, brothers and sisters; for moral damage see 1 Mazeaud 317; 2 Savatier 121; Cass. Req., April 10, 1922, S.24.1.153; Cass. Civ., Nov. 19, 1943, S.45.1.1.) But while the right to sue for moral and material damage belongs to every relative suffering loss or pain (see however note 16), the right of action for conscious suffering of the decedent survives only in his own right and consequently belongs only to his heirs, who are entitled to it with the succession. For the practical importance of such a distinction in case of a passenger's death, see note 13.

maritime cases.[8] So far as the American law is concerned, there was no right of action for wrongful death at common law,[9] but statutory provisions have been enacted in all states, following the example of Lord Campbell's Act (1842).[10] In the case of deaths on the high seas, consequently, there was no general right of action,[11] until a remedy was provided by the Federal Death on the High Seas Act of 1920.[12] This statute gives to the personal representative of a decedent whose death was caused by wrongful act the power to maintain a suit for loss suffered as a consequence of the death "... for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person or corporation which would have been liable if death had not ensued." Thus, the fundamentals of French and American law are not essentially different, although the items of damage may differ.[13] Each requires a violation of some duty, some wrongful act;[14] each provides that contributory

[8] See 2 Ripert 886; La Bourgogne, Seine, June 28, 1899, 15 Revue Internationale 67; Cass' Req., July 27, 1925, S.25.1.249; Rouen Dec. 23, 1925, D. Hebd. 1926, 140.

[9] See Prosser on Torts (1941) 954 and the numerous cases cited. For the history of the rule, see also Van Beeck v. Sabine Towing Co., 300 U.S. 342 (1937). For the English law, see "the rule in Baker v. Bolton" ((1808) 1 Camp 493) in Winfield on Torts (5th ed. London 1950) 197 and in Salmond on Torts (9th ed. London 1936) 359.

[10] 9 & 10 Vict., c. 93.

[11] See The Harrisburg, 119 U.S. 199 (1888); The Alaska, 130 U.S. 201, 209 (1889); Just v. Chambers, 312 U.S. 383 (1941); Shelton v. Seas Shipping Company, 75 F. Supp. 195, 199 (Pa. 1947); see also the authors cited, note 2. On the eventual application of state act, see note 18. For English law see The America, [1917] App. C. 38.

[12] 46 U.S.C. § 761 (1944). As to the prior law and the necessity for the passage of such a federal act, see 1 Benedict § 140 note 3 and the cases cited therein.

[13] The Federal Death Act does not allow for moral damages. See Middleton v. Luckenbach S.S. Co. Inc., 70 F. 2d 326 (2d cir. 1934), certiorari denied 293 U.S. 577 (1934); Peterson v. United New York Sandy Hoaks Pilots Ass'n, 17 F. Supp. 676 (E.D.N.Y. 1936). The Act does not provide a right of action for conscious suffering of the decedent; Decker v. Moore McCormack, 91 F. Supp. 560, 1950 A.M.C. 2001 (Mass. 1950); Gorton v. Moore McCormack, 1952 A.M.C. 69 (Mass. 1951). French law gives theoretically such a right, but, as a matter of practice, arrives at the same result, viewing the liability for conscious suffering of a passenger as contractual liability arising out of a breach of contract of passage. Then it is very difficult for the heirs, who in such a case exercise the rights of the decedent (see note 7 *supra*), to invoke that liability, in view of the provision for exoneration of liability normally inserted in the contract of passage. (The French Courts admit that the shipowner can, by a contractual provision, exempt himself from the fault of the captain: 2 Ripert 890; Cass. Req., Nov. 4, 1924, 2 Dor Sup. 867; The Amiral Ponty, Cass. Civ., July 27, 1924, S. 1925.1.249. It is more disputed whether he can free himself from his own fault. See 2 Ripert 892 and contra 3 Danjon Traité de Droit Maritime (2d ed.: Paris 1927)). As to the loss suffered by the relatives, the provision of exoneration of liability is of no consequence, for their rights *vis-à-vis* the tort-feasor are not precluded by the decedent's contract: see The Amiral Ponty, *supra*. On the right of the heirs, in American law, to continue an action begun, for his suffering, by the decedent see Pickles v. F. Leyland, 10 F. 2d (Mass. 1925) 371.

[14] See for American law, The Black Gull, 82 F. 2d 758, 761 (2d Cir. 1936), certiorari denied, 298 U.S. 684 (1936); The Vulcania, 32 F.Supp. 815, 1940 A.M.C. 225 (S.D.N.Y. 1940); Budgen v. Trawler Cambridge, 319 Mass. 315, 65 N.E. 2d 533 (1946). For French law, see The Afrique, Bordeaux, July 28, 1927, 5 Dor Sup. 419; The G.G. Jonnart, Aix, June 14, 1934, 12 Dor Sup. 435.

negligence does not bar recovery but rather is a factor to be considered in assessing damages.[15] The French and American courts also agree as respects a liberal construction of the notion of "beneficiaries".[16] But the Federal Death Act is unique in that its application is limited to the "high seas beyond a marine league from the shore of any state, or the District of Columbia, or the territories or dependencies of the United States."[17] Within the territorial limits, as before, state law applies.[18]

2. In addition to the general theory of liability for fault, however, the

[15] 46 U.S.C. § 766, (1944), altering the general rule of admiralty i.e., the equal division of damages: The Max Morris, 137 U.S. 1 (1890); The E. Moran, 212 U.S. 466 (1908). For the application of the new rule, see Pure Oil Co. v. Geotechnical Corp. of Delaware, 94 F. Supp. 866 (E.D.La. 1951). But in case of the application of state law (see *infra* note 18), contributory negligence may be a bar: Feige v. Hurley, 89 F. 2d 575 (6th Cir. 1937) (in personam action applying Kentucky law). The English Law Reform Act of 1945 (8 and 9 Geo. 6, c. 28) provides that ". . . a claim. . . shall not be defeated by reason of the fault of the person suffering the damage, but the damages . . . shall be reduced to such extent as the court thinks just and equitable having regard to the claimants's share in the responsibility for the damage". For French law, see Amos-Walton 240 (". . the damage will be reduced in proportion to the gravity of the plaintiff's fault, as compared with that of the defendant."); 2 Mazeaud 428; 2 Savatier 37; Cass. Civ., July 24, 1918, S. 1920.1.359; Cass. Civ., March 2, 1948, D. 1948. J. 256.

[16] The Federal Death Act includes illegitimate children and their mothers: Middleton v. Luckenbach S.S.Co., 70 F. 2d 326 (2d Cir. 1931), certiorari denied, 293 U.S. 577 (1931); Syville v. Waterman S.S. Co., 84 F. Supp. 718 (S.D.N.Y. 1949); but not a second putative wife who was neither a "wife" nor a "dependent relative"; Lawson v. U.S., 1951 A.M.C. 1927 (2d Circ. 1951). In the French law, the right to sue for pecuniary damage is extended to every relative actually supported by the decedent (for a sister-in-law, see Cass. Crim., Oct. 31, 1930, S.31.1. 145) or who might legally be entitled to support under an "alimentary obligation" (husband and wife, ascendants and descendants, parents and their sons and daughters-in-law, and reciprocally) (see Conseil d'État, June 16, 1944, S. 1945.3.57; Cass. Sociale, Oct. 21, 1940, D.1941. J.13). In the same way American courts held that while a brother must show loss of reasonable expectance of pecuniary benefits, the J. H. Senior, 1952 A.M.C. 189 (S.D.N.Y. 1951) "there is a presumption that minor children, by reason of the legal obligation of support of the part of their parents, sustained a pecuniary loss as the result of the death, even though they may have received no contribution," Nelson's Estate, 168 Misc. 161, 5 N.Y.S. 2d 398 (Surr. Ct. Westchester County 1938). See also Uravic's Estate, 142 Misc. 755, 255 N.Y.Supp. 638 (Surr. Ct. Kings County 1932). As to moral damage, i.e., pain and distress caused to the claimant, the French lower court cases (see Caen, July 4, 1935. D. Hebd. 1935, 514; Colmar, March 4, 1949, D. 1949. 273) disagree with those of the Court of Cassation which laid down the rule that only the existence of a right of support between the decedent and the claimant (alimentary obligation) entitled the latter to claim moral damages (Cass. Req., Feb. 2, 1931, S. 1931.1.123; Cass. Civ., Oct. 19, 1943, S. 1945.1.1).

[17] 46 U.S.C. § 761 (1944).

[18] 46 U.S.C. § 767 (1944). Before the Federal Death Act the statute of the appropriate state might be used in case of death on the high seas on an American ship: The Hamilton, 207 U.S. 398 (1907). Now state law is applied only in "state" territorial waters: Western Fuel v. Garcia, 257 U.S. 233 (1921); O'Brien v. Luckenbach Steamship Co., 286 Fed. 301 (E.D.N.Y. 1922); Etchevarria v. Atlantic and Caribbean Steam Co., 10 F. Supp. 77 (E.D.N.Y. 1935); Chambers v. Just, 113 F. 2d 105 (5th Cir. 1940), reversed on other grounds, 312 U.S. 383 (1941); American Stevedores, Inc. v. Porello, 330 U.S. 446, 459 (1947).

French law speaks of an "objective responsibility",[19] which is a liability without fault imposed for damage caused by an inanimate thing. More precisely, a presumption of liability is placed on the person who has a thing "in his care". This concept of liability has been derived from article 1384 of the Code Civil.[20] After many conflicting decisions, the Cour de Cassation (in Chambres Reunies) held, on February 13, 1930,[21] that a presumption of liability exists in all case of damage caused by any inanimate thing[22] and that this presumption can only be rebutted by proof of a fortuitous event or *force majeure*.[23] It is not sufficient for the person who has the thing "in his care" to prove that he has not committed any fault.

The question immediately arises whether maritime cases fall within the purview of article 1384. In the event that they do, it is necessary to determine who is the *gardien de la chose*, who has the vessel "in his care". For some time the lower courts were in dispute whether article 1384 applied to maritime cases;[24] thus, in the instant case of the *Lamoricière*, two courts of appeal gave conflicting decisions.[25] The Cour de Cassation [26] has resolved this conflict by stating that maritime cases are within article 1384 and consequently invoked the doctrine of objective responsibility in order to fix liability. As a result of this decision, it is possible to say that in almost every case damages may be recovered by any relative suffering loss on account of the death of a passenger[27] on the high seas, even in case of accident or shipwreck, for the presumption of

[19] For "Objective Responsibility", see Amos-Walton 262, 268; 2 Mazeaud 89–288; 1 Savatier 421–510. See also Ehrenzweig, Negligence Without Fault (1951) on both the American law and the French law (§ 20 note 88).

[20] "A person is responsible not only for the injury which is caused by his own act, but also for that which is caused by the acts of the person for whom he is bound to answer or by things he has under his care (les choses qu'il a sous sa garde)."

[21] Cour de Cassation, Chambres Réunies, in re Jand'heur, February 13, 1930, D. 1930.1.57; S. 1930.1.121.

[22] See *e.g.*, Cass. Civ., March 23, 1926, D. 1926.1.129 (a building); Seine, March 10, 1939, G.P. 1939.1.987 (gas-pipe); Aix, Jan. 17, 1944, J.C.P. 1945.2.2799 (elevator); Paris, May 5, 1936, D. Hebd. 1936. 351 (golf stick).

[23] *Force Majeure* must be "something which was unforeseeable, irresistible, and against which precautions are unavailing" (Amos-Walton 267). The French courts do not distinguish between fortuitous event and *force majeure*, either as to their substance or their consequences. See Amos-Walton 195; 2 Mazeaud 465; 1 Savatier 227.

[24] For the application of art. 1384 to maritime cases, see The Ouessant, Le Havre, January 16, 1912, 27 Revue Internationale 668; The Colonial, Aix, Jan. 7, 1924, D. 1924.2.108. Contra, The Astrea, Le Havre, Nov. 24, 1931, G.P. 1932.2.63; The Ville d'Oran, Le Havre, Nov. 25, 1930, Recueil du Havre 1931, 46; The Georges Philippar, Seine, June 9, 1942, Droit Maritime 1949, 435.

[25] For the application, Aix, Jan. 5 1949, D 49. J. 575; *contra*, Alger, May 25, 1949, Droit Maritime 1949. 326.

[26] Cour de Cassation, Chambre Civile, June 19, 1951, D. 1951. J. 717.

[27] In case of injury to a passenger, it is not possible to sue for damages under article 1384, for this liability is for breach of contract and not for tort. See Ripert 885; Cass. Civ., March 27, 1928, D. 1928.1.145.

liability is rebutted only by proof either of a fortuitous event or *force majeure*.[28] The Cour de Cassation in the same decision stated that it is the owner of the ship and not the captain who has the vessel "in his care". This view is criticized by French jurists[29] who maintain that the captain is the master of the ship. Nevertheless, it must be accepted as law that the shipowner is the *gardien*.[30]

3. Therefore, it would seem that French law protects the rights of the beneficiaries more effectively than American law, insofar as the French shipowner will find it difficult to escape liability under the requirements of article 1384. This conclusion is not without qualification. The American law as to limitation of liability[31] provides that the liability of the owner cannot exceed " . . . the amount or value of the interest of such owner in such vessel and her freight then pending", but in any event will not be less than $60 per ton in the case of personal injury or death. The French law does not have this kind of limitation. The French shipowner can escape his civil liability[32] for the acts of the captain by abandoning the ship and the freight to the interested parties.[33] This ancient[34] *"droit d'abandon"* includes even the situation where the ship has sunk,[35] thus rendering the rights of the interested parties meaningless. But

[28] French law, narrowly construes *force majeure*. It has been held many times that a storm does not provide a case of *force majeure*, excepting storms of extraordinary violence. See: Le Havre, Dec. 12, 1933, Recueil du Havre, 1934.1.80; The Ville d'Oran, Cass. Req., July 23, 1935, D. Hebd. 1935. 540; The Ville de Bougie, Montpellier, July 17, 1951, Droit Maritime 1952. 19. As to the instant case see *infra* and note 40.

[29] See Ripert in D. 51. J. 719; Dor in Droit Maritime 1949. 47.

[30] See Gervesie, S. 1949.2.121. De Juglart and Chasseriaux. R.T.D. Com. 1949.378 and 1951, 822.

[31] 49 Stat. 960 (1935), 49 Stat. 1479 (1936), 46 U.S.C. § 183 (Supp. 1951). On the history of this act, see Benedict § 475 at 316 and the case of The Iowa, 1936 A.M.C. 1340 (Ore. 1936). This right of limitation cannot be invoked by a foreign shipowner since the Federal Death Act provides that "Whenever a right of action is granted by the law of any foreign state . . . such right may be maintained . . . without abatement . . . any statute of the United States to the contrary notwithstanding", reversing the result of The Scotland, 105 U.S. 24 (1881); La Bourgogne, 210 U.S. 95 (1908); The Titanic, 233 U.S. 718 (1914). For the new rule, see The Vestris, 53 F. 2d 847, 1931 A.M.C. 1553 (S.D.N.Y. 1931); Petition of Donaldson A.R. Line, 1940 A.M.C. 1408 (S.D.N.Y. 1940).

[32] Even in cases of injury or death. See 2 Ripert 173; cases arising from the destruction of the Afrique (600 lives lost in the Gascogne Gulf), Cass. Civ., May 25, 1929, 19 Dor 338; Caen, March 12, 1930, 8 Dor Sup. 167 and June 25, 1930, 9 Dor Sup. 401; the case of the St. Philibert (400 lives lost in front of St. Nazaire), Nantes, July 19, 1933, 11 Dor Sup. 396.

[33] Commercial Code, art. 216 (1808, amended 1841) ". . . every shipowner is civily liable for the acts of the captain and bound by the engagements undertaken by him with regard to all that has reference to the ship and the voyage. He may in all cases free himself from the liability above stated by abandoning the ship and the freight."

[34] On the history of the right of abandonment, not clearly provided for before the 17th century, see Senigallia, 39 Dor (1939) 4 and Scialoja, Saggi del Storia del Diritto Maritimo, (Roma, 1946) 309. It is rather implausible that the rule was borrowed from the *noxae deditio* (a theory developed by Holmes, Common Law (1880) 26).

[35] See 2 Ripert, 148 and 194; The Aventin, Paris, May 24, 1862, D. 1862. 2. 175; see also the case of The Afrique, *supra* note 30.

this right of limitation does not exist when some fault of the shipowner himself contributes to the accident.[36]

The application of "objective responsibility" to maritime cases by the Cour de Cassation poses the question whether the rights of abandonment will be available to the shipowner in a suit under article 1384.[37] The concept of "objective responsibility" does not strictly concern itself with the behavior of the *gardien* (here the shipowner),[38] while the right of abandonment depends upon absence of fault on the part of the shipowner. Theoretically, it is possible neither to affirm nor to deny the right of abandonment in this situation, under article 1384.[39] This question remains to be judicially determined. To allow the shipowner such a right will work hardship on the interested parties, here the injured relatives, but to deny the shipowner the possibility of limiting his liability is equally harsh since he may have no fault in this type of case.[40] Perhaps for this reason, the Cour de Cassation, in the instant case, arrived at a unique solution, namely, limiting the liability of the shipowner to the fifth part of the damage, holding that *force majeure*, here the storm, was a cause of the damage, to the extent of eighty per cent. Such a construction, extremely desirable as a matter of natural equity, is, of course, theoretically weak.[41] It is doubtful whether this vexatious problem can be satisfactorily resolved by decision, in the absence, in the French law, of an equitable and practicable rule of limitation of liability. Only through legislation will a just solution be achieved, by

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[36] See 2 Ripert, 178; The Sainte Marie, Cass. Civ., May 15, 1892, 8 Revue Internationale 5; The Marie Ange, Lorient, June 9, 1936. 14 Dor Sup. 346; The Pacific Express, Rouen, July 22, 1950, Droit Maritime 1950, 547. As to the American law, the limitation statute, 46 U.S.C. § 183 (1951), provides that the liability of the shipowner can be limited only when the damage was occasioned "without the privity or knowledge" of the shipowner. For a definition of privity, see Mr. Justice White in La Bourgogne, 210 U.S. 95, 122, (1908); The 84-H, 296 Fed. 427 (2d Cir. 1923); Rautbord v. Ehmann, 190 F. 2d 533 (7th Cir. 1951). It may be said that mere negligence does not necessarily establish either privity or knowledge. See Robinson at 942. In another respect the statute is "unique in the world" (3 Benedict § 489), for it provides that "in respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel" (§ 183 (e)). See Springer, "Amendments to the Federal Law Limiting the Liabilityof the shipowner," 11 St. John's L. Rev. (1936), 14.

[37] See 2 Ripert 179.

[38] "Objective Responsibility" is not strictly a mere "presumption of fault," since the Cour de Cassation held in the Jand'heur case (*supra* and note 19) that "it is not sufficient to prove that he (the *gardien*) has not committed any fault". See Amos-Walton 264.

[39] See 2 Ripert 179 and D. 1951 J. 719. *Contra* De Juglart and Chasseriaux, R.T.D. Com. 1949, 380.

[40] Adopting this rule, the French law would go much further than the amended American limitation statute, since the American law requires at least the privity or knowledge of the master.

[41] As a matter of logical construction it is quite impossible to say that the storm was unforeseeable and irresistible for eighty per cent. (See the definition of *force majeure, supra* note 21.)

adopting a single criterion of liability and a scheme of limitation similar to that in the American law.[42]

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[42] The French law knows another rule of limitation: the uniform system adopted by France and eleven other states, in the International Convention of August 25, 1924. (League of Nations Publications: 120 Treaty Series 103.) For property loss, the shipowner shall not pay more than either £ 8 per ton or the value of the ship, accessories and freight (always evaluated at 10% of the value of the ship) at the conclusion of the voyage. In case of personal injury or death a supplementary fund of £ 8 per ton is provided to compensate the victims or their representative. But, this rule applies only in the event that either the ship or the claimant is a national of a state signatory to the convention, and not in cases where the ship and claimant are both French, or where either ship or claimant are nationals of a non-signatory. See 2 Ripert 224; 3 Benedict § 543. In Great Britain and Canada, the shipowner shall not pay more than £ 15 per ton in case of loss of lives or bodily injury or more than £ 8 in other cases. See Chorley and Giles, Shipping Law (London 1947) 47.

Book Reviews

ACADEMIA INTERAMERICANA DE DERECHO COMPARADO E INTERNACIONAL. *Debates de Mesa Redonda), 1948*. Academia Interamericana de Derecho Comparado e Internacional. Vol. 2, La Habana, 1951. Pp. 231.

Milestone, tombstone, or monument? A review of this volume makes this writer reflect to a certain extent on each one of these words. To understand them fully, however, and this is fittingly appropriate in the first issue of a new review devoted to comparative law, a certain amount of historical background must be given.

The Inter-American Academy of Comparative and International Law was voted into existence at the first meeting of the Inter-American Bar Association in Havana in 1941. It held its first regular session in 1945, the second session in 1947, the third in 1948, and the fourth in 1949. Answering a felt need which has been expressed for many years by those two illustrious leaders of international legal thought in this hemisphere, James Brown Scott and Antonio Sanchez de Bustamante, the Academy sought to create a living center where groups of scholars and students from all of the countries of the new world could come together, and, in actual roundtable debates and classroom work, reach real mutual understanding in their field of endeavor. This is the essence of comparative law work, and the Academy began brilliantly and faithfully carried on through the years noted above.

This volume is a milestone because it represents continuity in the publication activities of the Academy, and still the life of the Academy extends beyond this date. The first volume of *Debates* covering the year 1947 appeared in that same year and the first volume of the monographic courses in 1948. While the volume under review is important, the real monument to the Academy and its first director, Ernesto Dihigo, is contained in the volume of *Monographic Courses*. The quality of each volume reflects the high level of the Academy's work; the reappearance of the series after three years shows the vitality of the institution.

The three works have in great measure created the influence and prestige the Academy enjoyed.

That this influence is now not so great gives the volume the aspect of a tombstone. To this reviewer it appears that loss of leadership and lack of support have brought the Academy to an undeserved low estate. Death has taken many of the original members of the Academy, Scott, Sanchez de Bustamante, Juan Clemente Zamora, Manuel Fernandez Supervielle, to mention just a few. Other duties have called away the eminent director, Ernesto Dihigo, and the fine, hard-working secretary, Enrique Dolz. The support of the Carnegie Endowment, so generous in the formative years of the Academy, was withdrawn in 1949 when the Endowment decided to devote all efforts to the support of the United Nations.[1] The Academy was forced to reduce both scale and tempo of its activities.

[1] One of the Carnegie fellowships was responsible for this writer's attendance at the second

The fifth session had to be postponed; then regular sessions had to be abandoned. The Government of Cuba could not carry the whole burden. A special session, in co-operation with the regional office of UNESCO was planned for December, 1951. It was to deal with Fundamental Human Rights. Events postponed it to March; a recent change of government has put it off once more—perhaps this time forever. Let us hope that the reverse will be true.

The need is great, and the obligation of every lawyer in this hemisphere is clear. The Inter-American Bar must reassume or expand its support to this most neglected of its progeny. The Academy should be expanded to include at least a minimum six weeks course given at a time when students from *all* of the Americas could attend. Every national unit of the Inter-American Bar should raise money to endow the Academy and to find it a permanent home, to equip and staff it.[2] If each lawyer in the U. S. A. alone would give one dollar per year the job could be done. Special revenue stamps could be issued. This should become an obligation of the first rank.

It is easier to build on this magnificent tradition than to create anew. Therefore, it should become a clear duty of all of the persons in positions of influence to give all possible support to the reactivation; to the bringing back to the level where it is capable of holding a full session each year; to the level where it can produce outstanding volumes such as those mentioned above. The reservoir of Inter-American comparative legal learning is not so great that this source can be permitted to dry up. I hope very soon, indeed, to be able to write a review of another publication of the Academy wherein there will be no possibility of mentioning as characteristic of it the word tombstone.

The purposes of the Academy were manifold. In one week of each annual session of three weeks, six roundtable meetings were held with three private international and three public international law topics to be discussed. This volume reports the papers, debates, conclusions, and recommendations for the year 1948. The pattern was established in the first volume.[3] The importance

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and third annual sessions in Havana. The presence of ten fellows from various law schools and schools of social science in the United States added a most essential part of the atmosphere needed for comparative work.

[2] The apparent future demands of the Inter-American Bar Association show that the Academy might well become its permanent working center. Its sessions would give desired continuity. Its projects could prepare materials for use at the conferences. This need is made especially clear by the desire to unify the law in various fields shown by the following resolution adopted at the Seventh Conference (Montevideo, 1951):

> "THAT the Inter-American Bar Association, through the Colegio de Abogados del Uruguay, considering the continental interest existing in a Spanish translation of the "Restatement of American Common Law", suggest to the Facultad de Derecho y Ciencias Sociales del Uruguay the execution of that project; and that the Inter-American Bar Association take steps to obtain from the American Law Institute the supervision, without charge, of such translation, and it is recommended that the Executive Committee use good offices therefor."

[3] Debates de Mesa Redonda, Volumen I, Academia Interamericana de Derecho Comparado e Internacional, La Habana, 1947. Each volume contains a list of participants; the

of this type of work and the influence of the directive spirit of the Academy is shown in the fact that one of the private law sessions reported in this volume called forth a work by the leading Argentine scholar, Enrique Aztiria, on the *Nationality of Mercantile Corporations in the Inter-American Academy*.[4] The high character of the public law sessions is evidenced by the skillful chairmanship of that round table by Professor Manley J. Hudson.

Throughout the same three weeks a number of courses were given by outstanding experts from diverse countries.[5] I would like to make reference to the initial volume of *Cursos Monográficos*, which records six of those courses; two from the session of 1945, by Dr. Harold Valladão and Dr. Murdock, and four from the second session in 1947. The director, Ernesto Dihigo, stated in his note of introduction that the balance of the courses of 1947 and those of 1948 were to appear in the next volume. The next volume has not as yet appeared. There is no question but that this volume is important. The course given by Phanor Eder formed the basis for his work, *A Comparative Survey of Anglo-American and Latin-American Law*.[6] The work of Dr. Alfaro on *The Adaptation of the Anglo-American Trust to Civil Law* contained the bases of his suggested modification of the trust law of Panama of which he was the author. The works of the president of the Academy, George A. Finch, and Dr. Matos, distinguished Guatemalan internationalist, exercised great influence throughout the hemisphere.

It was a great experience for those of us who had the good fortune to be in Havana to hear these debates. The volume shows, in a most dramatic way, the necessity for a continuation of the efforts of all of the persons interested in comparative law. It is a *living* monument to the validity of working together for a common solution of our problems.

Comparative law requires a living, working center, and reorganized law of the hemisphere must maintain it.

D.D.S.

Native Malagasy Laws

Thébault, E. P., Traité de Droit Civil Malgache—Les Lois et Coutumes Hovas. DeComarmond, Tananarive, Madagascar; Jouve, Paris, France; 1951. Fascicules I & II; Le Statut Personnel, Les Personnes et la Famille; Les Biens, les Obligations et les Contrats; pp. 486.

Madagascar is an island off the southeast coast of Africa, and its area of 241,000 square miles is nearly that of Texas. The population is 4,350,000. In

running debates summarized in magnificent form; the papers of the proponents or reporters and the conclusions approved by the members of the Academy.

[4] The full title is La Nacionalidad de las Sociedades Mercantiles en la Academia Interamericana, Buenos Aires, 1948.

[5] Cursos Monográficos, Volumen I (Ernesto Dihigo) Academia Interamericana de Derecho Comparado e Internacional, La Habana, 1948.

[6] See review, 26 N.Y.U. L.R. (Jan. 1951) 228.

1885 it became a French protectorate and in 1896 a French colony, but the private laws of the native group were retained insofar as not in conflict with or superseded by new French laws. The original independence of the several native tribes is still recognizable in the respective private laws of each, and is perpetuated by the principle of the "personality of the law."

In a correct sense, there is no single civil law of Madagascar, but several different tribal systems. The most important and most numerous group is the Hova, and their better-developed laws which predominate in most of the island constitute the subject of the treatise under review. The judicial system of Madagascar provides for both French courts and native tribunals; the parties are governed by their "personal law." While French citizens and foreigners are not likely to come under native law or before the native courts, the natives may come under French law or into the French courts in a variety of situations.

The author is the Vice-President of the Court of Appeal of Madagascar and President of the native civil chamber of that court. In the first two parts of what will be a more comprehensive treatise, he displays not only a thorough knowledge and understanding of the native law, but also a comprehension of advanced legal systems such as that of France. He is consequently able to describe the native Malagasy laws and customs with a facility and clarity which make his work useful to natives and foreigners alike.

The first part of the volume presently available discusses the general principle of the personal law (*le statut personnel*) and the Hova law pertaining to the family and persons. The second part covers property, contracts and obligations; the third will deal with successions, donations and testaments; a final part will set out for convenient access the most important Hova laws and customs. The author expresses the hope that other writers will make similar studies of the laws of the other native groups: the Betsimisaraka, the Betsileo, the Tsimihety, the Sakalava, the Antaisaka, and the Antandroy.

In some matters the Hova law appears more advanced than some more modern legal systems, in many matters it still reflects aspects of primitive and community patterns of civilization, and at the same time there are institutions in Hova law which are quite different from those generally known by the same name elsewhere.

Thus, in Hova law, all women have the same legal capacity as men, and in their system of community property neither spouse can carry out acts of administration or alienation involving rights of the other who objects. Nonetheless the family is a well-knit group forming the basic unit of their society.

In contrast, and despite the generally solicitous attitude toward children, an expression of the old arbitrary parental authority is seen in the right of either or both parents to reject a child and sever all relationship with it. Another vestige of more primitive forms appears in the *fokonolona* (village or community council) which must approve many important acts in the personal and property relations of its members.

Illustrating the danger of comparison by name only, the Hova institution of adoption is quite different from anything we know by that title, beyond the primary resemblance of being an artificial parent-child relationship. In Hova law, any person can adopt any person—either related or stranger. Thus, a child can adopt its own parent or grandparent, a husband can adopt his wife and she can return the compliment. Reciprocal adoptions are perfectly in order. A Malagasy can very well have a natural father and several adoptive fathers. All this is not so startling when it is understood that the main purpose is to enable the adopted person to inherit from the adopter; this is reminiscent of certain stages in the development of adoption in early Roman law. At the same time, adoption extends the power and influence of the family, and also assures the presence of some one to watch over and care for the adopter's tomb (compare the far-reaching effects of the *sacra* in early Roman law).

The second part of the treatise discusses property, obligations and contracts, and reflects a comprehensive legal system. This is predicated on legislative texts, customary practice and established judicial decisions. In these fields, as in family law, there are found together old customs and modern institutions, demonstrating the repeated observation that the legal system reflects the life and development of the people whose society it is intended to regulate.

For those interested in the history of private ownership, the Hova law offers an opportunity to examine the stages of development, in relatively recent times, from the exclusive and absolute ownership of everything and everybody by the monarch through various forms of collective ownership. The king whose conquest unified the several tribes ruled from 1787 to 1810; he started the distribution of land among the tribes under which it was then subdivided among the communities. At the present time, private ownership has much the same attributes as in France, but the State owns all natural subsoil resources. There are a few situations in which a condition of inalienability can be attached to certain private property; and special problems arise in connection with the ownership of tombs which are treated like *res religiosae*.

The Hova law does not contain any general theory of obligations, but French law is used to supplement what there is and to fill the gaps.

The sources of Hova law are several, but most important and most recent before the domination of France were the 1868 "Code of 101 Articles" and the 1881 "Code of 305 Articles." To the older native sources, there has also been added modern native legislation. One may gather from the author that the potential difficulties of determining under which "personal law" an individual is governed do not often materialize in practice, probably because the Malagasy people are not a roving kind.

In some respects, the principle of the "personal law" represents a stage in the development of law through which many countries, including those of Western Europe, passed quite a long time ago. Despite the extensive establishment of the principle of the territoriality of law in the experience of many legal systems, it would not be a reliable prediction to say that the law of Madagascar

will follow the same pattern. There are so many unknown future factors which will affect the result. As long as the Island of Madagascar and the life of its people continue in a fairly static condition, there will be no occasion to expect much change. However, if by reason of location or resources, Madagascar or any other remote area with an old indigenous system of law, should become very significant in the fluid world situation of today or tomorrow, the simple and localized life would become complex and mobile, and a legal system based on the principle of personality of law would become unworkable and inadequate. Where such an eventuality may be contemplated, it might be well to think ahead and plan the change in advance.

Although the treatise under review is written in French, it may be considered as an addition to the materials becoming available to American students of comparative law. The work is done well and lucidly by a competent writer. The cumulation of such publications can only enrich the resources for comparative studies.

J. D.

Comparative Jurisprudence: Heidelberg and Louvain

The Legal Philosophies of Lask, Radbruch, and Dabin. Translated by Kurt Wilk. Introduction by Edwin W. Patterson. 20th Century Legal Philosophy Series: Vol. IV. Cambridge: Harvard University Press, 1950. Pp. xliii, 493.

The translations of the works included in the 20th Century Legal Philosophy Series are a significant contribution not merely to legal philosophy, regarded as a somewhat separate discipline, but almost equally so to comparative jurisprudence. This has always been inherent in legal philosophy which reaches towards general, or in other words, comparatively valid, conclusions, and it is notably so in the case of the present volume, which happily combines works of the Baden or Southwestern German school of Neo-Kantianism with the Belgian Neo-Thomism of Louvain. By definition, Neo-Thomism apparently involves comparative analysis of medieval with modern thought, while Windelband's treatment of philosophical problems, which made the Baden school famous, forms an excellent introduction to important aspects of comparative jurisprudence.

Moreover, the authors comprised in this volume, Lask, Radbruch, and Dabin, are significantly comparable among themselves. They are linked together not alone by their concern for values but also by their common interest in method. Lask's concise treatise is a landmark in which the problems of legal philosophy are reinterpreted and transformed into problems of method. In order to save "nonempirical" legal philosophy from natural law metaphysics, Lask adopts dualism of method, in which the empirical reality of law is assigned to legal science and its values to legal philosophy. The recognition of jurisprudence as an empirical science of culture for methodological purposes does not neces-

sarily imply "absolute cultural values" (p. 25); it presents "the unique method of purely empiristic operation upon an imagined world of meanings." (p. 29) Whether general rules or the individual case, whether objective law or subjective legal right are contemplated, the methodological theme is the "constant interplay of living reality and legal meaning," that "peculiar intermingling of the worlds of the Is and the Ought" which reminds Lask of the "metaphysics of occasionalism."

This, it is believed, was the important discovery made by Lask that proved fruitful in subsequent inquiries and, together with incisive critical remarks, makes his short treatise indispensable to anyone who seeks to deal competently with questions of legal method.

To this dualism in method, Radbruch added relativism, mild and qualified, to be sure, but nevertheless genuine. Since it denied objectivity to values, though not to reality, it assumed that values are subjective. This affected the method itself and was responsible for the fact that Radbruch, starting from Windelband, Rickert, and Lask, was unable to produce a "nonempirical" legal philosophy of values, as originally planned. Despite constant effort to rise above empirical fact into the realm of transempirical values, Radbruch's relativism always brings him down again to earth. This is scarcely to be deplored; the reader will gladly accept the brilliant style, the seasoned experience and wisdom of the statesman-jurist in exchange for strict methodological consistency. Roscoe Pound calls him, perhaps not without some exaggeration, the foremost philosopher of law of the present generation.[1]

Dabin also is concerned primarily with method. But in the climate of French legal thought, the methodological problem of value and reality becomes that of the "given" and the "construed." The outstanding feature of Dabin's thought is the thesis that law is wholly "construed" and not "given" at all, a thesis which contradicts venerable traditional doctrine. Nevertheless, although he most emphatically rejects "juridical natural law," he adopts a "*natural legal method*". For Dabin, this means in essence that law is prudence and not science. This is to say that somewhere between Heidelberg and Louvain the meaning of the problem has changed; a method of cultural *science* has become a method of *elaboration* of the law.

Dabin stresses the point that the "arbitrament of prudence is not arbitrary." He regards the jurist as a ***pragmaticus legum*** and mentions the ***regula rationis*** that justifies laws "conforming to the legal method," even though they may not vindicate justice. The method of elaboration, developed in considerable detail, consists in "the discernment and effective realization of means most appropriate to ends", in paying due regard to the distinction between "desirable" and "realizable" public good (material realizability) and to the technical equipment of definition and conceptualism, aptness for proof and concentra-

[1] Roscoe Pound, Justice According to Law, New Haven: Yale University Press, 1951, p. 19.

tion, in short, to "practicability" (formal realizability). The strength of this method, which may perhaps be regarded as a species of *pragmatic rationalism*, lies in demonstrating that means react upon ends, that the resistance of facts, the subject-matter to be regulated, and the technique by which it can be managed, modify, transform, sometimes even frustrate the impact of rules and principles. In this, the method is also *realistic*.

So much for method. As respects *value*, the picture is somewhat somber. Lask admits that "the fitting of law into a system of cultural values remains a task for the philosophy of the future." Has it accomplished the task during the half century that has since elapsed? Radbruch, finding justice empty, introduces expediency and certainty, only to observe tensions between the three aspects of the idea of law.

While the concept of law—formulated with disarming simplicity as "the complex of general precepts for the living-together of human beings"—is to be delimited by reference to the concept of justice, the *content* of the latter is to be found in the "transempirical idea of purpose," which comprehends the trichotomy of individual, collective, and work values. The corresponding philosophies of life—individualism, transindividualism, and transpersonalism—at once contradict, and dialectically turn into, each other. In short, there is no system of values by which law can be delimited, but only a "system of systems."

Only by relativism is democracy held justifiable (a position much, but belatedly, regretted today), while the validity of law is based upon the "authoritative fiat" of a "will which is able to carry it through against any contrary legal view", and upon the "certainty which it alone possesses." If in 1932 this sounded like the abdication of the Weimar régime, or a prelude to totalitarianism, we should not fail to observe the appearance at an earlier date of a similar trait in Lask. For a "fundamental departure from ascribing value exclusively to the individual personality, a departure toward an idealizing view of community life", seems to have had an appeal even to his mind, an appeal at times irresistible to German and Slav, yet remarkably less so to Anglo-Saxon, Latin, and other peoples.

When Lask died a soldier's death in 1915, the Hungarian poet Babits asked in an inspired poem whether the philosopher remembered on the Galician battlefield the world of cultural values he used to dream of while walking among the vineyards of Heidelberg. The sacrifice of these values in the "transindividualism" of war could not be demonstrated more convincingly than by Lask's untimely death.

While both Lask and Radbruch formulated their doctrines of values, as it were, as epitaphs of epochs, Dabin wrote his book in 1943-44, incorporating the substance of ideas previously developed in preceding books that had been published in 1929 and 1935. He is haunted by doubt and, indeed, himself raises the question whether his doctrine will be called "statist" or "authoritarian".

Dabin's hierarchy of values, premising the primacy of spirit over matter, the individual over the collective person, society over state, is far from being authoritarian or statist. But bracketed by the paramount principle of the "public good", it has but limited application. "Public good", indeed, seems to be "two-faced." Law, to Dabin, remains "necessarily subordinate to the ends of politics" (245), while "all politics hangs on something 'mystic', i.e. something absolute" (362). His realism, on the other hand, implies at least the inclination to reverse the order of ends and means, or, in terms of his own definition, "the order postulated by the end of the civil society and by the maintenance of civil society as an instrument devoted to that end" (234).

Freedom of choice of the statesman-jurist—and this extends to possible solutions that recommend themselves by reason of superior expediency—is defended by the argument (quoting Thomas Aquinas) that "it is always a matter of affairs that imply more or less debate and counsel" (349). This argument, predicating freedom of choice upon prudential considerations, is also useful for authoritarian purposes. This tendency can scarcely be mistaken when we read that "the individual in the state is never done with doing his duty" and that "he remains in justice bound to take the . . . public good for the norm of his outward life and even his thoughts and wishes" (450). In the light of these remarks, the statement that "the measure . . . is the public good, not the right of the individual" (366), in principle concludes in favor of "statism," however mitigated in practice by individualism.

On the one hand, it is possible to interpret the failure of the philosophy of value to demonstrate the existence of ultimate values, free from contradiction or ambiguity, as an "historically cognate" phenomenon in epochs which, having lost the ability to distinguish law from tyranny, are doomed for catastrophe. At the same time, this failure of the philosophy of value may also be interpreted as "rationally cognate" to schools of thought verging on scepticism and empiricism. This perhaps is the product in Neo-Thomism of overripe thought mediating between the outlook of the medieval thinker and that of our atomic age and in Neo-Kantianism of the direct influence that Hume exercised upon Kant. There are obvious interconnections between these two eminently urbane schools of continental thought as well as with the Anglo-American development, derived from the impulse to unite in a common effort to save the cultural heritage.

Although the authors are primarily concerned with method and value, these do not exhaust the rich content of the volume. To test his theory, Radbruch surveys various branches of the law. Dabin endeavors to base the logical division of law exclusively on the state as its subject matter. Both offer a vast apparatus, in the one case predominantly German, in the other Belgian and French. These materials invite comparison; Radbruch frequently invokes the Weimar Constitution and the German codes, while the *Code Napoléon* and the Belgian codes are copiously quoted by Dabin.

There is encouragement to be found for comparative law in the conciliatory attitude displayed by the authors in dealing with objections to their doctrines. For example, Dabin regards the law of civil society (*jus politicum*) as the "sole true law", but admits also that all societies "necessarily produce law", accepting hereby the "pluralistic" doctrine of "social law." He makes a similar effort to bridge the gap between the contradictory views, on the one hand, that "law that is in no way active is dead law" and, on the other hand, that "its relative or even total lack of efficacy destroys neither its existence nor its validity" (251). I confess difficulty in following the reconciliation of such contradictory statements on one and the same page, or in understanding in what sense private transactions may fall outside the category of the legal rule, as Dabin affirms, while it is at the same time admitted that the law of the state "sanctions the private rule in the same way as the rule of the law of the state" (249).

Yet in treating the problem of compulsion, Dabin's effort to find a basis of reconciliation seems significant. His definition of law is a mild variant of the theory of coercion and displays a certain tolerance for the opposed viewpoint. This makes sense, since whichever of the contrary doctrines we prefer, it remains necessary to account for the partial truth of the opposite doctrine. Dabin holds that "capacity for exaction by force most neatly defines the legal rule" but admits that if law were not obeyed, on the whole, spontaneously, "no compulsion would stand the test" (253). Thus, compulsion turns from a vital factor into an epiphenomenon of obedience and even of carrying into effect the legal rule: "the laws threaten force so as not to have to use it or, at least, to have to use it only as a last resort" (254).

Nor is this all. Dabin admits with perfect candor that in the case of public and international law both pillars of his definition of law, namely, (organized) civil society and compulsion, are lacking. As respects public law, "the constituted power cannot at the same time be the constituent power", and "there will always be in the state authorities that are practically irresponsible." In the case of international law, however, both the "lack" of compulsion and the "absence of international society" are admitted (261–264). The inconsistency is explained away by elegant rather than convincing arguments. Objections are refuted in a manner tantamount to veiled admission.

This conciliatory attitude, which extends also to other problems, reminds one of the ways of thinking of certain civilian jurists, to whom it matters little whether to formulate the same point as rule or exception and for whom, it has been said, philosophy is a decoration rather than a source of principles to be observed. This may have inspired the remark of the judicious Haesaert that one who reads Dabin "no sooner finds a foothold than he slips."[2]

I am disposed to defend this attitude, although of course not its excesses or abuses. From various international congresses come reports warning us that schools of thought no longer understand each other. Comparative jurisprudence

[2] Haesaert J., Théorie Générale du Droit, 1948, p. 61.

is in position to remedy this situation. It is believed that at a time when all of Western culture is seriously threatened, a threat evidenced even by these unhealthy and degenerate disputes of the schools, less intransigence is needed. Thus, the spurious heat of controversy, quite out of place in the face of a common, present danger, may be assuaged, and the existing Babel transformed into temperate, cultured, and above all comprehensible discourse, for which comparative jurisprudence may well provide the basis of understanding.

BARNA HORVATH

Philosophy *vs.* Soviet Law

Soviet Legal Philosophy: papers by Lenin, Stuchka, Reisner, Pashukanis, Stalin, Vyshinsky, Yudin, Golunskii, Strogovich and Trainin, translated by Hugh W. Babb, with an introduction by John N. Hazard. 20th Century Legal Philosophy Series. Cambridge: Harvard University Press, 1951, Pp. xxxvii, 465.

In this volume, the English reader gets the first collection of the most important Soviet publications on legal philosophy which have originated during the first quarter of a century of the existence of the Soviet system. For the larger part of the materials, this is the first translation in any western language. Notwithstanding a few mistakes,[1] the translation is good and easily readable; I have the impression that even most of the controversial points in translation have been conditioned by Professor Babb's desire to avoid at any price the stereotypes current in English translations of Marxist literature. In this he has fairly succeeded. The American student of legal philosophy who reads this book will find himself transferred to an intellectual world which, strange as it may appear at the first glance, is not so unfamiliar at all.

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[1] The most serious is a passage on p. 349 which speaks of "the extermination and punishment of . . . spies, murderers, and wreckers, . . ." where "to round up and punish . . ." would be more appropriate. Professor Babb adds in a footnote that a verbal translation "enticement" would not fit the context in the passage. But "extermination" preceding punishment fits even less.

In some cases, in my opinion, well-established technical terms should be better continued in use. *Razvedka*, for example, is sometimes translated by "reconnaissance" instead of "intelligence service"; *Sovietskoye stroitelstvo* by "Soviet building" (organization of Soviet administration would render the meaning); "fault" is used (instead of "guilt") in technical argument on criminal law (e.g., pp. 221–2). Historical nuances such as the derivation of the concept "*enemies* of the people" from the French Revolution are easily lost by the use of different terms such as "foe"; in cases of Marxist terminology ("goods-producers," e.g., pp. 169–70, instead of "commodity producers," "barter" instead of "commodity exchange"), the search for fluid expression may even impair the meaning. In a few cases, on the other hand, the translation has been impaired by too meticulous adherence to the Russian text. A distinction between "law in the objective sense, or law in the subjective sense" (p. 19) is necessary for the Russian or German, who uses *pravo* and *Recht* for both concepts, but—at least if no explanatory note is given—slightly misleading for the English reader who can easily distinguish between "law" and "right." The German author, Kautsky, is as in Russian, transcribed as Kautskii.

To a large extent this depends on the very definition of the subject. From the standpoint of legal philosophy, in the narrowest sense of the word, the selection of authors and, to a large extent, also that of the papers reproduced was, in my opinion, correct; though it is necessary to note that the narrow philosophical bias has been accentuated by the choice of the cuttings, which were necessitated by the limitations of space.[2] To me personally, legal theory gives little sense unless it is investigated either in the context of the whole intellectual life of a certain society—from this standpoint, of the authors reproduced in the book, Reisner has to be understood in connection with the liberal and anarchist trends which were in evidence during the first stage of the revolution, Pashukanis, say, in connection with Pokrovsky's commodity-exchange conception of history, Vyshinsky in connection with Soviet policies in the family field, etc.; or, alternatively, legal theory has to be investigated in connection with the legal practice which it has to explain: in the Soviet case this is specially inviting because of the scarcity of court-cases reported. I feel skeptical about legal philosophy in isolation: in the Soviet field, the only one about which I can speak as a specialist, I am convinced that the evidence as contained in this volume leads the concept *ad absurdum*. This implies no reproach against translator and editor who have produced, in a masterly way, such evidence as has hitherto not been available where it is most needed, namely amongst the western students of diverse legal philosophies. Now they can see what happens to these philosophies in a time of social upheaval.

But for the benefit of those who read this volume in order to learn something about Soviet society I must add that, from the standpoint of that society, all the exciting arguments reproduced in this volume represent a mere digestive process in which all kinds of non-Soviet ideologies were sorted out without anything spectacular (from the point of view of legal philosophies current before on the Continent) coming out. After the very possibility of law under socialism was under dispute for so many years we find, at the end, a very familiar legal system not only in existence (in fact, it was codified and elaborated during those very years when the philosophers denied its compatibility with socialist economics) but even asserted as the proper organizational form for the community: those points which are interesting because of the differences between the Soviet and the western social setting (the law of economic intercourse between state-owned enterprises, and the possibilities of granting security of rights in a system which, avowedly, aims not at preserving the *status quo* but at continuously remolding it) are hardly touched on in this volume. The "digesting process,"

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[2] Even within the delimitation of the subject given it is, to say the least, controversial whether Stuchka's statements about Roman Law need be preserved at the expense of those on the origins of Soviet law in which he played a leading part (cf. note 96 on p. 66) or whether it was correct to cut from Vyshinsky's basic article those parts where he deals with the diverse fields of law (I must confess, at the time of the events I learned only from these omitted parts what the generalities put forward as his philosophy were intended to mean.)

as reported in this volume, represents the mere pre-history of Soviet legal thought.

Within these limits, the western academic reader of the book will notice that the theories discussed, in actual content, are those with which he is familiar from his studies. There is, of course, the Marxist framework, at least in terminology. With a fitting comparison Professor Hazard stated in his preface that "the variations are as between a Bach, a Mozart, and a Debussy. There is a noticeable difference, but there is a constant factor as well. There is no sharp break as between the music of the Occident and the Orient" (p. xix). There is, indeed, no theorist represented in the volume who would better fit into a symposium of Islamic, or Thomist legal philosophers; but within the scope of western legal philosophies elaborated during the last two centuries, we find fairly everything represented—except the backward looking "historical school" of early nineteenth century Germany. Everyone professes Marxism, just as Nominalist and Realist philosophers in the thirteenth century, while elaborating the theories that brought mediaeval philosophy to an end, said the Creed. I would not doubt the subjective sincerity of the professions in either case;[3] but from the fact that all philosophical statements in the mediaeval Church, or in Soviet Russia, were made in certain forms it does not follow at all that all these statements belonged to the scope of Catholicism or Marxism respectively, within any internally consistent definition of these philosophical systems. In essence, as distinct from terminology, the western reader may recognize in Reisner's statements a quite competent presentation of that school of legal philosophers which identifies law with regularized social custom, in Pashukanis, however he disliked such a description,[4] a representative of the modern variety of the Natural Law school[5]—with the rider that the supposed incompatibility between socialism and law (in general) should be solved not by preservation of private enterprise but by abolition of the legal method of regulating human relationships. At the beginning as well as at the end of the theoretical circle described in the collection, ample tribute is paid to the teaching of realistic jurists such as Ihering who described law as the enforcement of certain social interests by the state.[6] The Marxist rider attached demands the definition of those interests in terms of class: while, at the start, references to the statements of Adam Smith and Gumplowicz about "the defense of the rich against the

[3] This implies no questioning of the correctness of Vyshinsky's statements about the opposition of Pashukanis and his followers to the basic tenets of Marxism as understood in the USSR and even to the Soviet regime: in the absence of any concrete evidence about the accusations the most serious argument that can be made for Vyshinsky's case is the fact that persons who were fundamentally opposed to a consolidation of any given stage of the revolutionary development (Pashukanis, *l.c.*, p. 272) were morally bound to fight Stalinism with all means, if their theoretical declarations were meant seriously.

[4] Which was very early used by his critics, see *l, c.*, p. 253.

[5] Bodenheimer, Jurisprudence (New York 1940) p. 26 had recognized this parallellism of views.

[6] *L.c.*, pp. 54 and 414–5.

poor" and law as "a form of the dominance of a minority over the majority" would do,[7] in developed Soviet society the class character of the rules enforced by its law could be proved only by an analysis of their concrete contents, which is excluded by the very selection of the materials included in this volume. Some tribute was paid even to Duguit;[8] Kelsen's normative theory was always rejected because of his refusal to analyse the social origin of norms, but in more recent times defended against Pashukanis' attacks so far as they concerned his emphasis on norms.[9] The most recent definitions included in the volume[10] are strictly positivist: they define soviet law as "the aggregate of rules of conduct (norms) established or approved by the state authorities of the socialist state" and enforced by it, the purposes for which these rules are established being enumerated in the definition. As general legal philosophy has come round from a naïve positivism over essays in all kinds of alternative philosophies to a very elaborate one, so has the appreciation of Soviet law come round from a commonsense acceptance of its existence over scepticism as to its possibility and desirability to a definition of Soviet legal philosophy as a general theory of Soviet law as a basic institution of Soviet society. To Stuchka, at least in his early writings,[11] the existence of Soviet, or proletarian, law aside with feudal and capitalist law is simply an example for the class-conditioning of law, not a basic problem. Reisner is the first to attack positivism:

"Those who held it [the law] in their hands considered that they had a monopoly as regards the source of all social regulation, while those who sought to snatch it wished to employ it to harness constraint to their party chariot." (p. 74).

[7] P. 56.

[8] It would be more obvious if some writings of Hoechbarg, who played no important part in the disputes on legal philosophy but was the chief drafter of the Soviet Civil Code, had been included.

In view of Pashukanis' sharp opposition against the very concept of socialist law, his criticism of an applicability of Duguit's concepts to private ownership under N.E.P. (p. 152, note) rather strengthens the case for the relevance of these concepts from the standpoint of Soviet legal policies; Pashukanis asserts that the Soviet state, as long as it needed the private entrepreneur, could limit its activities but not make the protection of his rights dependent upon whether their exercise served public policy: this, however, was precisely what the Soviet state did (cf. my *Soviet Legal Theory*, pp. 93 ff.) and 1 Gsovski *Soviet Civil Law*, pp. 332 ff.) It may be argued, in favor of Pashukanis' view, that, eventually, the Soviet state had to liquidate private enterprise and the *kulak* class, because a regulation of their activities proved impossible: this argument, however, misses the possible applications of Duguit's concepts in the explanation of the problems of intercourse between Soviet state enterprises, which provide the actual problems of present Soviet civil law.

[9] Golunskii-Strogovich, *l.c.*, p. 423.

[10] *Ibid.* p. 386. The definition differs from that given by Vyshinsky in 1939 (in a paper not included in that volume, cf. my *Soviet Legal Theory* pp. 243–4) by (a) a different solution of the problem of custom protected by, though not explicitly included in, the law and (b) nonmentioning of the Communist Party (as distinct from the state organs proper) as an organ from which law emanates.

[11] P. 18, and even more clearly in the Guiding Principles on Criminal Law, which were written by him in his official capacity in 1919, and are reproduced in Professor Hazard's introduction, pp. xxiii–iv. Later, Stuchka became a supporter of the commodity-exchange conception of law, though in a more moderate variety. Cf. my *Soviet Legal Theory*, pp. 153–4.

To him, State (in general) was evil: "the proletariat conquers the state only for the purpose of depriving it of any possibility of further existence" and "when we deny the old state we must at the same time renounce its ideology in its entirety" (p. 80). An essential part of that ideology is the belief that law is something ordained by the state: according to Petrazhitskii, whose theories are combined by Reisner with a glorification of the "revolutionary consciousness of justice" of the masses, allegedly predominant during the first revolutionary period,[12] law is the intuitive concept of justice dominant within a certain social group. One implication of this concept—which was broadly attacked in the discussions reported in the volume—is the co-existence of diverse laws (including even capitalist law for the N.E.P.-men) in a mixed society such as the U.S.S.R. of the period; another is the rejection of any attempt of legislation to interfere with established group-custom, including customs such as bride-purchase, polygamy, blood-feud, etc. which are dealt within the chapter of the Penal Code which deals with "offences originating from tribal life."[13] The one remarkable fact about these theories is that, in the conditions of the twenties, they did not prevent the man who defended them from being quite an influential teacher at a Soviet university.

It was against this background that Pashukanis' theory could be regarded as a progress in the systematization if not of Soviet law—he explicitly refused to interpret it as a specific category (p. 122)—then of the current ideas about law in general. To orthodox Marxists, his very quest (p. 113) for a general theory of law which should be neither psychology (as was Reisner's theory) nor sociology (as ordinary Marxism) should have appeared heretical; and so did his solution which derives the specifically legal form of human relationships from the conditions of commodity exchange (not of production relations): to the legal concepts developed in the civil law field, all other forms of law, such as criminal law and constitutional law, are assimilated. On this last point he came first under attack, and corrected himself as early as 1930: "My basic mistake," he wrote, "was to confuse the specific *indicia* of the bourgeois-juridic form with law in its entirety" (p. 261). He even agreed that, in an article of his in which exchange-value had been identified with the general need for proportionate distribution of social labor, "the economic part played by the proletarian dictatorship" had been "reduced to naught, and planned influence . . . converted into anticipation of market relationships and market prices" (p. 247). But while he agreed that his theories should be corrected as to allow for an active part played by the state, he definitely refused to accept as legal in form such

[12] Pp. 86–7: Reisner refers to having won, during the revolution, Lunacharsky for his point of view. P. 93, he recalls with some sadness, the early period (slightly idealized): "when we wrote our decrees and directives during this epoch we then furnished our statutes not so much with the threat of constraint as with agitation and propaganda demanding voluntary subordination."

[13] P. 101. Reisner was tactful enough to attack only the People's Commissariat of Justice for what, in fact, were the agreed policies of the Party and the enacted laws of the state.

interference against market-relationships, or even any attempt at formalization of Soviet economics and society:

"We have no final system of production relationships at the present time for the reason that we are changing them every day and every hour . . . vindication of proletarian law is essentially conservative—a labored attempt to hold at a given stage, to erect that stage into a system, and to turn the transition period [i.e., socialism in the current terminology, R.S.] into a special conception. . . ." (pp. 271–2).

Pashukanis did not deny the existence of legal relationships under socialism—in 1923 (pp. 179–80) he had made some observations upon the civil law relationships amongst state enterprises which remained interesting even for a later period—but he regarded them as an evil; the need for the employment of legal specialists in the localities was a mere consequence of the activities of other legal specialists at the centre who made legislation so complex that the non-specialist could not find his way through it.[14] But the Soviet system, as it was emerging from the "second revolution," needed a clear and stable legal system rather than economic relationships which are changed "every day and every hour": Pashukanis' elevation of arbitrariness, if not anarchy, into a higher system of human relationships was bound to come under attack; Vyshinsky would add that a reduction of law to policy involved a refusal to defend the rights of the citizens (p. 329). Stuchka's and Pashukanis' concepts of a fading away of Soviet law rendered it powerless to develop (pp. 330–1). It was not difficult to show that the concepts of a withering away of law, already under socialism, and of reduction of what remained to an ideology originating from exchange relationships, contradicted the whole attitude of the Party which had destroyed old legal institutions only in order to create new ones and whose outstanding leader had declared that "*everything* in the field of economy bears the character of public law and not of private law."[15] This supposed, Pashukanis, who had explained the specifically legal form of human relationships by reference to commodity-exchange, had given no valid answer to the question how to "define the special characteristics of law as a form of policy."[16]

But the question remains, and the acceptance of legal positivism as the basic theory, which dominates the whole rest of the volume, signifies hardly more than the acceptance of the task as a positive problem no escape from which should be sought by references to revolutionary initiative, the shortcomings of law as a regulator of human relationships, etc., etc. In this sense, too, the volume represents the mere prehistory of Soviet legal philosophy, culminating in what might appear to be a peak of abstract speculation though it was bound to appear as an aberration to those who had to build a new legal system all the time. Professor Hazard closes his Introduction with reference to the pertinent ques-

[14] In this selection, which eliminates the more practical aspects of the discussion, this point —which, in fact, was decisive for the fall of Pashukanis' school—comes out only in his statement on pp. 240–1.

[15] Lenin, quoted by Yudin p. 292 and see also p. 287.

[16] Vyshinsky, *l.c.*, p. 329.

tion whether events have triumphed over ideas in the U.S.S.R. or ideas were reconsidered in the light of events while the ideas dominated the long-range development of legal science nevertheless. The ideas which dominated the minds of the Soviet legal philosophers were not identical with the ideas which inspired the October revolution; it would be more correct to say that the great upheaval let loose quite a lot of ideas which were abroad in Russia as well as in other countries. They had their day and disappeared—in the field of law just as in other fields of social and intellectual life. Reisner's anarchism and Pashukanis' depreciation not only of the N.E.P. but also of Stalinist state socialism reflected some trends in Russian thought during the great crisis; to some extent they might even refer to Marx's and Lenin's belief that, ultimately, something more than full employment, equality of opportunity, and a reformed rule of law would be found on the road which was opened by the socialist revolution. But the theories tested in historical experiences are not ultimate beliefs but organizing concepts, and the basic concept of Marxism is revolution in the sense of transfer of power from one social group to another so that it can be used for the transformation of social institutions. We need not accept Mr. Vyshinsky as the herald of every socialist law which may come into being anywhere; but we may take some leaf from his book, namely that the legal theory of a society is that which explains and improves the working of its legal system, not the most radical of the analytical theories available at the time when that society came into being. There is some truth in Reisner's statement that no law can work unless it conforms with the concepts of justice of those who are subject to it, and in Pashukanis' statement that no institutional law can conform with developing demands for justice. But the women of the Soviet East had to be emancipated, at a certain time, whether this conformed with the village custom or not, and the economy of the revolutionary state had to be made to work, so that it could hold its own in a world of foes. Social life is a permanent struggle between that which is, that which is necessary, and that which is ultimately desirable: the law of a revolutionary period is that which brings what is necessary into being. There is no end to history, and, as I have said on another occasion, the utopias of one century may be the political slogans of the next and the commonplaces of the one after that. But legal theory deals with real social organization.

RUDOLF SCHLESINGER

VISHINSKI, A., *La Teoría de la Prueba en el Derecho Soviético.* Montevideo (Uruguay): Ediciones Pueblos Unidos, 1950 (i.e. 1951), Pp. 282 and table of contents.

A translation in a Western language is a boon to those unable to read Russian lawbooks in the original. This version of Vyshinsky's Theory of Evidence under Soviet Law (in Russian 1941, second edition 1946) by an unidentified translator, is smooth and idiomatic and, judging by internal evidence alone, seemingly accurate. It is a historical and comparative study, discussing western theories.

Chapter 3 (pages 105–128) deals with the general theory of the English law of evidence, based chiefly on Stephen, both in the original and in Russian translation. Elsewhere there are many references to English law (citing *inter alia*, Kenny, Thayer, Dicey and Wills). Apart from the inevitable Bolshevik clichés and propaganda, the treatment is substantially correct and echoes many pertinent criticisms. On the whole, *mirabile dictu*, he speaks well of the English law and recommends the study of its rules of evidence to Russian judges.

In the introductory chapter, the views of the function of the courts under the Soviet regime, outlined in the author's The Law of the Soviet State (Babb translation, 497 ff.) are expanded. Chapter 5 (pp. 159–182) deals specifically with the Soviet law of evidence. Too much space is devoted to refuting the "errors" of some previous writers. In several particulars, the treatment of the subject in Gsovski's Soviet Civil Law is emphasized and expanded. We are still left with only a vague notion of how the law of evidence works in practice in the Russian courts. This vagueness is perhaps inherent in Soviet law. There are no rules of exclusion, except in civil cases under the Statute of Frauds or other statutes. Hearsay evidence is admissible, if the original source is clearly identified (p. 247). Any fact may be evidentiary independently of its content or weight (p. 161), qualified later (p. 173 ff., 213 ff.) that only relevant or essential facts are admissible, but there is no guide to determine what is "essential." In fact, Vyshinsky categorically says (p. 218) there can be no rules at least in criminal cases, and the book is primarily concerned with criminal law. In the examination of witnesses, Marxian dialectic is to be used, but how that can help is not disclosed.

The chief difference from our system is that Soviet law assigns a very active role to the court with unrestricted power and duty to take the initiative and order the submission of evidence. He ignores modern tendencies in several countries along this line, but in Russia they are "undoubtedly carried to an extreme" (1 Gsovski, p. 859).

Soviet law rejects formal grounds for weighing evidence. The guiding principle for the judges' decision is their inner or intimate conviction based upon consideration of all of the circumstances of the case in their entirety (p. 168). The socialist conscience of law plays an important part in forming this intimate conviction; the judges' "impressions" and "sentiments" are properly an element therefor (p. 196).

The classes of evidence in Soviet law do not seem to differ from those of other systems. Save for mental or physical defects, there is no disqualification of witnesses, but they may be subjected to examination by experts in criminal cases. In civil cases, they may be challenged for interest or bias, a rule he criticizes, as he does also the taking of testimony by deposition as contrary to the principles of oral trial, the basis of Soviet procedure (pp. 251 ff.). Experts if called by the court are compelled to testify. They have the right to examine witnesses, although there is no code provision to that effect (p. 251 ff., citing the Vickers case).

He finds that the rules as to *onus probandi* are based on new legal principles (p. 228) but he failed to convince this reader of the accuracy of such a statement. He warns against confessions; the object of the Prosecutor should not be to obtain confessions, but, significantly, the cases of conspiracies against the State may offer different circumstances (p. 238 ff.).

The liveliest part of the book is the discussion of circumstantial evidence, concluding with an interesting true detective story in a murder case in which he was the prosecutor.

Vyshinsky is a well-read jurist and there is a rich reward for students of evidence in the perusal of the book. It fails however, to give a clear picture of the actual working of the law of evidence in Russia, and as propaganda addressed to the outside world, its ineptitude is startling.

P. J. E.

García Máynez, E. *Introducción a la Lógica Jurídica.* Mexico City: Fondo de Cultura Economica, 1951. Pp. 257.

Contemporary Spanish-American philosophy of law is based, theoretically on Kelsen's Pure Theory of Law, and, philosophically on the German and Austrian philosophies of the "phenomenological movement" (Husserl, Scheler, Hartmann, Dilthey, Heidegger).[1] But these ingredients are mixed in very different ways by the leading Spanish-American philosophers of law.

Eduardo García Máynez,[2] who studied in Mexico under Antonio Caso, and in Europe under Nicolai Hartmann and Alfred Verdross, started from Kelsen. But he was not satisfied with the purely analytical approach, with Kelsen's "basic norm" as the reason of validity of the legal order. He felt that the ultimate validity of law must be based on absolute values and believed that Scheler's axiology furnishes the possibility of obtaining this ultimate basis.[3]

While he has remained an adherent of Scheler's philosophy of absolute and objective values, he has, in recent years, become more and more interested in the logical side of the law. This transition was, perhaps, influenced by his excellent Spanish translation of Kelsen's "General Theory of Law and State"[4] and can be seen in his book on the definition of law.[5] This interest led to the work under review.

Whereas the American "sociological jurisprudence" and, particularly, the "realist school" shows a tendency to underestimate logic, based on the well-known aperçu of Justice O. W. Holmes, Continental and Latin-American jurists, trained in the Roman Law, have always emphasized the prominent posi-

[1] See for a full exposé: Josef L. Kunz: Latin-American Philosophy of Law in the Twentieth Century, New York. 1950. In Spanish: La filosofía del Derecho Latino-Americana en el Siglo XX. Buenos Aires. 1951 (Spanish translation by Luis Recaséns Siches).

[2] See *op. cit.*, note 1. pp. 94–100.

[3] See his early study, published in English translation in the volume, edited by this writer: Latin-American Legal Philosophy. Harvard University Press. 1948, pp. 459–512.

[4] Teoría General del Derecho y del Estado. Mexico City. 1950.

[5] E. García Máynez: La Definición del Derecho. Mexico City. 1951.

tion of logic in the realm of law. But the new problem is whether there is a particular "juridical logic," apart from the Aristotelian. The Argentinian Carlos Cossio interprets Kelsen's Pure Theory of Law as the discovery of this particular juridical logic; the Colombian E. Nieto Arteta sees in juridical logic one of Husserl's "regional logics." Kelsen himself maintains that he has only applied Aristotelian logic to the realm of oughtness. Perhaps the difference between these attitudes is not so deep.

In the work under review, García Máynez shows himself an adherent of a special juridical logic. Whereas Aristotelian logic applies to the realm of isness, dealing with the problem whether a judgment is true or false, juridical logic applies to the realm of oughtness, dealing with the problem whether a normative judgment (a norm) is valid or invalid. The ambition of the work under review is to give an exhaustive table of the logical axioms a priori of any law.

Juridical logic, too, has its four axioms of identity, contradiction, *exclusio tertii*, and *rationis sufficientis*. The author begins with the axiom of contradiction: two contradictory norms of identical temporal, personal, territorial and material spheres of validity cannot be valid both in the same legal order. The axiom of the *exclusio tertii* means that of two such contradictory norms both cannot be invalid. On this basis the author studies the problem of contradictory norms; first of norms, derived from the same source: contradiction between statutory norms of equal hierarchy or of different hierarchical position; contradiction between norms pertaining to different legal orders of a complex legal order (federal and State norms), contradictory norms created by courts or administrative authorities, contradiction between customary norms. Then follows a study of contradictory norms, derived from different sources: statutory and customary norms; finally intersystematic conflicts between international and municipal norms.

The logical axiom *rationis sufficientis* means that every norm, in order to be valid, must have a sufficient reason of validity, must be capable of being traced back to the "basic norm." The axiom of identity means, e.g. that a norm which prohibits what is legally prohibited, is necessarily valid.

These four axioms of juridical logic have necessarily ontological foundations which apply, not to the validity or invalidity of the norms, but to the legally regulated human conduct; e.g. the important axiom that what is not legally prohibited, is legally allowed. The work ends with a complete "*axiomática jurídica*," giving in a table the four supreme axioms of juridical logic and the four supreme axioms of formal juridical ontology.

On the logical plane, the author follows strictly the teachings of Husserl and Pfänder, excluding all psychologism and normativism: the logical axioms are independent; they are neither descriptions of how men actually think, nor normative prescriptions of how they ought to think.

As far as legal theory goes, it is clear that the work is based on Kelsen's "pyramid of law," on his "basic norm," on his theory of the fourfold spheres of validity of every legal norm, on his theory of the relation between creation

and application of the law, on his theory of the collision of norms in general and, in particular, of norms of international and municipal law.

Naturally, all these axioms are purely formal. For instance, the axioms that two contradictory norms of equal spheres of validity cannot be both valid, cannot be both invalid, does not give us the key for deciding which of the two antagonistic norms has to prevail. The criteria for the solution of *this* conflict are not logical axioms, but positive legal norms. The juridical axiom *rationis sufficientis* indicates only the *formal* validity of legal norms; as to their *material* validity the author remains true to Scheler's and Hartmann's axiology.

All these logical axioms have nothing to do with the concrete contents of legal norms. They are purely formal, but they make clear the logical necessary connections. The book analyses the essential formal connections existing, on the one hand, between the concepts of legal duty and legal right, and, on the other hand, between legal right and its exercise; the latter ideas had been developed in an earlier study of the author.[6]

All these juridical-logical and ontological axioms are not norms, but rather "*vérités de la raison*" in the sense of Leibniz. But they show that, notwithstanding all attacks against the scientific character of the science of law, from Kirchmann to Lundstedt, notwithstanding all the change of law, as to its contents, law, too, has its axioms which are both universal and a priori.

The book under review is a highly interesting and important work.

JOSEF L. KUNZ

Travaux de la Commission de Réforme du Code Civil: Année 1949–1950. Paris: Librairie du Recueil Sirey, 1951. Pp. 839.

This is the fifth volume of the Reports of the Commission appointed by the French Government in 1945 to prepare the revision of the famous French Civil Code. The fifth volume will attract wide attention, also outside France, because the draft of a law on private international law is included. If this draft becomes law, French conflicts law will change in many respects.

The work of the Commission during 1949–1950, as reported in the volume, was on three topics: Marriage, Matrimonial Regime, and Conflict of Laws. For Marriage, a draft of "Rights and Duties of Husband and Wife" has been agreed upon. There were strong dissensions within the Commission which led to the resignation of one member who thought that the Commission had gone too far in its endeavor to secure equal status to the wife (p. 88; and see Henri Mazeaud, "Une famille sans chef," [1951] Dalloz Hebdomadaire, Chronique 141). On Matrimonial Regime it was decided that, in the absence of a property regime chosen by the parties, the legal marital property regime would be community of *acquets*, replacing community (cf. La. Civil Code, Art. 2399). This decision was reached by a vote of six to four (p. 181).

The part on Conflict of Laws in the volume includes a preliminary draft of

[6] In English translation in *op. cit.*, note 3, pp. 513–547.

a law on private international law (p. 435) prepared by a subcommission on the basis of a first draft submitted by Professor J. P. Niboyet, member of the Commission. The discussions of the sub-commission are contained in the previous volume ([1948–1949] Travaux, p. 711; *cf.* Delaume, "A Codification of French Private International Law," 29 Can. B. Rev. 721 (1951) (based on the sub-commission draft). The new volume brings the discussions of the full commission, which run over 345 pages, and the text of the final draft (p. 852). The draft law consists of 115 sections (text also in 39 Revue Critique de Droit International Privé (1950) 111).

A book note is not the place for a discussion of a draft law on private international law of this importance. A first reading of the discussions suggests that the draft should be carefully studied especially from the American point of view. The discussions do not show that the federal structure of the United States was always duly considered by the drafters. For example, section 37 of the draft provides that the marital regime of spouses who marry without contract shall be governed by the law which governs their status at the time of marriage, normally their common national law (section 27). If this law is not the same, says section 37, the marital regime shall be that of the place of celebration of the marriage, except that in the case of marriage before a diplomatic agent or consul the regime will be that of the country of the agent. Assuming that American citizens from different states of the Union get married in Paris at the City Hall, their regime will—under the draft—be that of community of *acquets*, even though the spouses may be from states which both have separation of property. At present, French courts look into all the facts of the case, including the presumed intention of the parties, and are likely to hold that French law does not apply in such a case, which would seem to be the better solution.

The vocation of our time to codify private international law is a controversial question everywhere, including France. Whatever the ultimate disposition of the draft in France, the work of the Commission, composed of outstanding members of the French legal profession, is one of the important contributions to this branch of the law, comparable to the preparation of the drafts for the Restatement of the law of Conflict of Laws. Therefore a translation into English not only of the draft but also of the discussions should be worthy of consideration.

K. H. N.

PAGENSTECHER, M., *Der Grundsatz des Entscheidungseinklangs im internationalen Privatrecht. Ein Beitrag zur Lehre vom Renvoi.* Abhandlungen der geistes- und sozialwissenschaftlichen Klasse, Akademie der Wissenschaften und der Literatur, Jahrgang 1951, Nr. 5. Wiesbaden: Verlag der Akademie der Wissenschaften und der Literatur in Mainz, in Kommission bei Franz Steiner Verlag, GmbH, 1951. Pp. 68.

This monograph provides an excellent review of the problems connected

with renvoi with primary reference to German law. The principal conclusions as summarized in a resumé (*Selbstbericht*), which has been specially prepared by the author, and translated into English by the reviewer, are as follows:

"*In principle*, in sharp contrast to the German practice, the renvoi doctrine is rejected in the present study. Nevertheless, the doctrine is regarded as admissible within certain limits on the following grounds:

"The ultimate end of international private law is the application of the same substantive rules of law in the decision of a particular case in all civilized states. This however is an assumption that can be realized only through international agreement of all countries; whether this will occur, is questionable. Consequently, each individual state should endeavor even now to resolve "negative" conflicts of laws in a manner that will at least promote the widest possible uniformity of decision in the courts. But this can be brought about neither through the classical doctrine of reference to the entire foreign law (*Gesamtverweisung*) nor by uncompromising adherence to the theory of reference to the internal law (*Sachnormverweisung*); hence the author takes a middle course.

"Specifically, his proposals are as follows: (1) A "direct" reference back (*Rückverweisung*), i.e., to the German internal law, should be allowed by a German judge only in case, but also always in case, the conflicts law of the state in question is to be characterized as a reference to internal law, since in that event the same substantive provisions will be applied by both of the states alone concerned.

"(2) A reference to the law of a third state (*Weiterverweisung*) is admissible only in case, but also always in case, it results in the application of the same substantive provisions, both in the state to the law of which the German conflicts law refers and also in the state to the law of which further reference is made, so that in consequence there is uniformity of decision between Germany and *both* the foreign states immediately concerned.

"(3) These provisions (Nos. 1 and 2), proposed as a basis of legislation, are also to be accepted as existing German law. The unwillingness of the prevailing view to admit this is due to two sources: Failure to recognize, first, that Art. 27 EGBGB prescribes acceptance of a reference back (*Rückverweisung*) only for those cases where the reference in question in the conflicts law of the state making the reference is to be regarded as a reference to internal law (*Sachnormverweisung*). And, second, that this provision does *not* relate to reference over (*Weiterverweisung*), here leaving complete freedom to legal science and practice; consequently, as respects this the solution that appears best *de lege ferenda*, must be deemed existing law."

The foregoing careful analysis of the much discussed renvoi problem, which in its main lines follows the suggestions of Ernst Rabel, instead of those ultimately accentuating the *lex fori*, e.g., of Martin Wolff, deserves the attention of students of the subject.

H. E. Y.

BEITZKE, G. *Das Staatsangehörigkeitsrecht von Albanien, Bulgarien und Rumänien*. Sammlung geltender Staatsangehörigkeitsgesetze. Forschungsstelle für Völkerrecht und ausländisches öffentliches Recht der Universität Hamburg. Band 5. Frankfurt am Main: Wolfgang Metzner Verlag, 1951.

This series on the nationality laws of various countries, so far all in Europe, will be welcomed by all who have needed information on foreign nationality legislation in legal practice or academic research. The present volume deals with the laws of three of the countries behind the Iron Curtain. According to the announcement on the back cover, the USSR and the Baltic states have also been treated (vol. 3) and the volume on Poland is in preparation. Volumes on France, Switzerland, Great Britain, Belgium and Luxemburg likewise have appeared and those on Spain and Portugal, the Netherlands, and Italy are being prepared.

The volume under review is divided into three parts. The first part is devoted to Albania, the second to Bulgaria, and the third to Roumania. The material is treated uniformly in each part. An introductory section deals with the development of the nationality legislation, discussing concisely the main provisions of former and present laws as well as the effects on nationality of territorial changes and exchanges of population. A brief bibliography concludes this section. The main section contains the texts of important past and present legislation and pertinent treaty provisions. A third section presents a very useful comparative list of the main provisions of nationality legislation enacted since the three countries became separate national entities.

All three countries base acquisition of nationality by birth primarily on *ius sanguinis*. *Ius soli* has a very subordinate role, being applied only in the case of foundlings and, in Albania and Bulgaria, to children of parents who are stateless or whose nationality is unknown. Dual nationality is not recognized in any of the countries and in Bulgaria is a punishable offense. Provisions on denationalization have been broadened constantly since the beginning of World War II and at present appear to permit ready denationalization of political *émigrés*. The Bulgarian and Roumanian laws also provide for the confiscation of the assets of denationalized persons.

The book is carefully prepared. Among minor flaws, aside from occasional misprints, one might mention the absence of source reference in the Albanian part and the alternating use of source references in the native language and German in the other parts. The German translation of the sources at times lacks precision. It would also have been useful had the author given some description of his method of translation and analysis in a brief introduction. It is not clear whether the author knows the native languages or has been entirely dependent on translations and whether the translations used were prepared for this volume or, if not, where they came from and whether they were unofficial or official ones. Finally, some reference to the local literature in addition to

that in German, French and English would have enhanced the value of the bibliographies.

These minor criticisms should, however, not detract from the fact that this slender volume constitutes a valuable contribution in a field of law where the student is only too frequently hampered by the lack of important materials and by language barriers. It is to be hoped that the series will be continued and will ultimately be extended beyond Europe, to cover the important nationality legislation of non-European countries, including the newly independent states of Western, Southern and South Eastern Asia.

HERBERT J. LIEBESNY

NEUMEYER, F., *Patentkarteller*. Stockholm: Kooperativa Förbundets Bokförlag, 1947. Pp. 309.

NEUMEYER, F., *Monopolkontroll i USA*. Stockholm: Kooperativa Förbundets Bokförlag, 1951. Pp. 256.

Only in recent years has the antitrust problem caught the interest of the general reader and aroused public debate in Sweden. The incentive came from a Commission of Post-War Economic Planning which proposed a system of public registration of cartels. The proposal was adopted by the legislature in 1946. Whereas prior legislation of 1925 had confided the investigative initiative to the Crown itself, the Act of 1946 originated a permanent governmental bureau of monopoly investigation. Agreements which the Bureau deems to be in restraint of trade, upon request, must be entered on its official cartel register when conditions of price, production, circulation, or transportation have been interfered with. The bureau is furthermore empowered to single out for special scrutiny any business or industry on the presumption that the free flow of goods is hampered by restraining contracts or agreements, or for other particular reasons. Full co-operation on the part of the officers investigated is required by special provisions in the Act.

In the fall of 1951 another royal commission, dealing with related questions, proposed a complete remodelling of the present legislation of 1946, involving the creation of a new supervisory body and stricter control of both monopolies and cartels. Its report has given rise to severe criticism and is still being reviewed by various authorities.

On the whole the public debate on antitrust matters in Sweden has been rather unrealistic, both sides lacking the deeper understanding which is nurtured alone by extensive studies and practical experience. It takes education of a special kind to inculcate the ideals of free competition, progressive management, and a minimum of government interference and to visualize them hand in hand like the three graces. No country has done more for the development of antitrust legislation than the United States. Although even in America regulation of business is a subject of much controversy, yet the discussion is rendered far more realistic and refined than in Europe, thanks to half a century of American antitrust enforcement and a continuous public debate.

This poses the question whether a book could be written to teach Europeans at least the necessary fundamentals of American antitrust philosophy. The task would be a difficult one. For one thing, even in the United States there is a lack of good textbooks on this subject, its scope being too broad for condensed treatment. Yet, the author addressing continental Europe would have to encounter the additional problem of educating the reader on American legal terminology, American government and administration, American business practices, and perhaps a bit of the common law system, all of it just as he goes along. Even a well-versed specialist might hesitate.

Luckily a wholehearted attempt has been made to familiarize the Swedish public with this phase of American law. Mr. Fredrik Neumeyer, who from the time he wrote his doctor's thesis some twenty years ago has been an ardent student of various methods to curb the abusive power of cartels and monopolies, has twice in the last five years—and with good timing—undertaken to publish books in Swedish on *Patent Cartels* (1947) and *Monopoly Control in the United States* (1951). The former work in spite of its title deals mainly with American antitrust cases, although it touches briefly on corresponding legislative solutions or attitudes in some other countries.

Mr. Neumeyer's work on *Patent Cartels* is outlined in the following manner. Having presented the reader with various definitions of cartels as distinguished from trusts and mergers, the author turns to the American glass container industry, the cartelization of which was laid open by the well known *Hartford-Empire* case. Almost sixty pages are devoted to a thorough analysis of the interesting material thus made available. Mr. Neumeyer's engineering background permits him to start off with an illustrated description of the most important machine types that were patented by the major members of the patent pool involved in the case. The author then gives an over-all picture of the structure of the glass container industry. He goes on to a presentation of the offensive patent pool in its various aspects, including some interrelated foreign patents and international cartels. Finally, he discusses the conflict between the antitrust laws of the United States and the management of this industry.

The second chapter deals with the all-inclusive international cartel of 1939 in the chemical field between the giant firms Du Pont in the Western hemisphere, and Imperial Chemical Industries[1] in the Eastern. The full text of this agreement has been revealed to the Bone U.S. Senate Committee at its patent hearings. The author gives in addition the historical background of the agreement as well as a brief discussion of some phases thereof. A multitude of licensing contracts entered into by one or the other of the two parties prior to their agreement of 1939 are listed in an appendix.

For the sake of illustration, the author proceeds in the third chapter to outline the intricate pattern of a five-partite international cartel in the plastics industry. There follows a catalogue of international patent cartels, classified

[1] *Cf.* Comment on this case in this issue, pp. 128 ff.

by the goods and articles concerned. Naturally, the list is not intended to be complete. A brief chapter on international cartels with a party or pool in Sweden closes the review of regular patent cartels.

Government initiative to compulsory cartelization came to the Germans with the Führer principle in the early thirties. In a following chapter, this system is contrasted with the democratic streamlining of American research and production during the war towards an allout effort for the rapid development of the atomic bomb. In this connection, the author sketches some postwar problems on the exploitation of patents based on governmental research. A large chapter is devoted to a survey of the cartel legislation of various countries as well as recent attempts to obtain a supernational check on the activities of international cartels. The author thereafter touches upon some pros and cons in the evaluation of patent cartels. The remainder of the book gives some highlights on patent monopolies (called "trusts", and exemplified by the United Shoe Machinery Company with its special lease system), and a short account of trade mark cartels. A bibliography and five appendices are added.

The scope and contents of the second publication by Mr. Neumeyer, *Monopoly Control in the United States*, is comparatively easy to describe. The reader is in the introduction made familiar with the general setup of American antitrust laws. Then the author takes him back to the early history of the common law to trace the origin of some terms and thoughts, characteristic of the Sherman Act. The colorful legislative history of the Act itself is well told with much detail.

The real core and substance of the book is the following chapter which deals with administrative and judicial procedure in antitrust matters. The subheadings include Complaints, various types of litigation, the Grand and the Petit Jury, Aspects of evidence, Jurisdiction, Oral testimony and documentary proof, Consent decrees, Administrative procedure, and Antitrust suits between private parties. Over fifty pages are devoted to this presentation.

In the following five chapters, the author dwells on some special aspects of the applicability and enforcement of the antitrust laws; he treats their relationship to Patents, Trade Marks, Co-operatives, Labor Unions and International Cartels, respectively.—The closing twenty pages offer some information on legislative criticism and reform. The Keezer poll of 1949 is briefly examined, among other things. And major amendments of the pertinent legislation are reported until 1951. A bibliography is added, and the texts of the Sherman Act, the Federal Trade Commission Act, and the Clayton Act are partly set forth in the appendix.

The two treatises by Mr. Neumeyer should be welcomed as a valuable contribution to the almost nonexistent Swedish literature on antitrust matters. Both of the volumes are written in a fluent and popular style, and yet are packed with information. The text can be read and understood by any intelligent layman. The author's presentation is a factual and descriptive one,

catering to readers such as business men and engineers. His mission is informative and educational. But this approach of a "photographic" character could be dangerous in that it lends itself to propaganda. Mr. Neumeyer has, however, successfully avoided such pitfalls. He offers no blacks and whites. His sketches are not one-sided or distorted. Rather does the author take pains to present the case of both government and business. Thus, even European lawyers could study his books with satisfaction as long as they do not look for legal analysis and theorizing.

As to the general composition of Mr. Neumeyer's writings, little need to be said about the book on *Patent Cartels*. The author has well solved his problems of selecting and treating raw materials. It seems, however, that the catalogue on international cartels would fit among the appendices rather than in the center of the book. And the chapter on Swedish patent cartels could easily be compressed into some footnotes to other chapters. Canada, too, has received unnecessary space. Although Canada has its own subheading in the chapter on legislation, it is later on treated *de novo* under the subtitle "Other countries".

Far more questionable is the outline of the subsequent publication, *Monopoly Control in the United States*. There is a great inconsistency between that broad title and the contents of the book. The former promises a bird's-eye view of central antitrust problems such as industrial mergers, trusts, stock acquisitions, or of the whole bigness *per se;* the reader expects to find the story of cases such as *Alcoa* or *Columbia Steel* or the *Great A & P*, of all of which he might well have heard. And of the latter problem of size? What the author does is to skip the matter.[2] Even fields like tieing contracts, illegal rebates, exclusive dealing agreements or commercial boycott are done away with on the map. Mr. Neumeyer does give a careful presentation of the history and procedure of the antitrust laws. But then he branches out into five fields of specialty, viz. patents, trade marks, co-operatives, unions, and international cartels. To be sure, confinement and limitations we must have. It appears, however, to be more correct to prune down the branches than to curtail the trunk.

That much for the outline. It remains to add a few words on the author's conceptions and interpretation. We cannot agree with Mr. Neumeyer's observation that the judicial development through the last decades has been centered on the pivoting point of 1911, "the rule of reason", advanced in the case of *Standard Oil Co. of N.J.* (*Patentkarteller*, p. 172; *Monopolkontroll i U.S.A.*, p. 14). The author seems to disregard the trend towards condemning certain types of business conduct as illegal *per se*. One may indeed doubt whether the cited case of 1911 today has any authority at all. When it comes to procedural questions the author is quite accurate. But on p. 42 in the *Patent Cartel* book he advises the reader that cases on patent infringement must be adjudicated

[2] But these central anti trust problems have been treated by the author in a recent article. *Cf.* Neumeyer, "Einzelmonopol und Oligopol im amerikanischen Antitrustrecht," 1 Auslands- und internationaler Teil zu gewerblichem Rechtsschutz und Urheberrecht (Germany, 1952) 24–37.

"in the state where the infringing act took place, it being no matter for the federal courts; only in the last instance has the Federal Supreme Court jurisdiction". And on p. 44 of the same book the author speaks highly of the role of the jury in patent infringement cases.

Some of Mr. Neumeyer's condensed case notes are misleading. About the *General Electric* case of 1914, the author observes that "a license agreement, restricting and checking price and marketing conditions, was upheld by the Supreme Court. Such limitations were authorized by the court as long as they implied a "normal profit on the monopoly right secured" (*Patentkarteller*, p. 174). It will take some patience to disentangle the two counts of the case from this confusion.—The fate of the *Mercoid* case, reported in the *Monopoly Control* book (p. 115–116) is hardly better. The patentee is erroneously said to have delivered unpatented parts, "that being his only source of income". But it was the licensee and not the patentee, who made and delivered those parts. In the same case the offense is characterized somewhat vaguely by the formula "imposition of restrictions on a product". The real fact situation and the holding of the case never appear.

The editing and proof reading of the two volumes has not been entirely satisfactory. Thus, we are told that in America the technological co-operation between two or more contracting parties is called "technological know-how" (*Patentkarteller*, p. 79). The Lanham Act is on several occasions misdated in the *Monopoly Control* book. In the same volume the National Labor Relations Board is said to have been created first by the Wagner Act (p. 172), and then once more by the Taft-Hartley Act (p. 178–179). These are but three examples.

On the whole, there can be no doubt that the two treatises by Mr. Neumeyer fulfill their purpose. They are well designed to introduce an ignorant foreigner and layman to the occupants of the magnificent and fascinating House That Uncle Sam Built, the antitrust laws.

KAJ SANDART

ENGELMANN, F., *Der Kampf Gegen die Monopole in den U.S.A.* Beiträge zum ausländischen und internationalen Privatrecht. Max-Planck-Institut für ausländisches und internationales Privatrecht. Tübingen: J. C. B. Mohr (Paul Siebeck), 1951. Pp. xvii, 198.

The Max Planck-Institut for foreign and international private law in Tübingen (Germany) deserves the highest praise for this endeavour to start in Germany a discussion of American antitrust policy. The decrees of the Military Government and High Commission on "cartels" have made this issue one of the "hottest" in Germany. Clarification is highly desirable. Engelmann has made a remarkable "first step." His book is the best available in Germany at this time.

The book, which has 198 pages, deals in Part I with the development until 1911 (*Standard Oil* case), in Part II with "Court opinions and legislation after 1911 as to close combinations," in Part III with "Court opinions and legislation

after 1911 as to loose combinations." The book, obviously completed in a first draft in 1945, ends with a "postscript": "The development in U.S.A. after 1945". "A Critique of the Antitrust Policy" and an "Attempt of an Interpretation" take additional 17 pages.

The writer has a predominantly negative attitude to the legal development in American antitrust legislation. On page 164 he gives his basis for his legal interpretation. He tells us that U.S.A. has a "*monopol-kapitalistische*" economy. If one has this opinion, the entire discussion of antitrust legislation becomes senseless. The basis for this decisive statement of the book is a reference to some general statements of economists. Engelmann as a lawyer believes he can accept such conclusions. Perhaps he should read what the Russian economist, Varga, had to say on this subject.

One cannot write on comparative law in the field of economic organization without accepting, at least for the sake of discussion, the basic purpose of the foreign law. Our law remains full of the hope to maintain a competitive market, whether "perfect" or "imperfect." Our courts are influenced by this hope in their examination of each legal institution. One cannot discuss the American antitrust attitude, unless (for the time being) one accepts the scope of problems and facts contemplated by American law. Engelmann intentionally excluded consideration of the use of patents, trade marks, and copyrights for purposes of restraint of trade, as well as international cartels and American participation therein. Can anyone in 1951 have rendered a just evaluation of American antitrust policy with these significant omissions?

Engelmann obviously uses the civil law yardstick of conceptualism in discussing American concepts of "monopoly" and "restraint of trade". In discussing the monopoly cases, the dynamic development of this concept from the 1911 *Standard Oil* case through the low of the *Steel* case to the high of the 1946 *American Tobacco* case is overlooked by Engelmann. In fact, this last case is treated as a "price conspiracy".

Engelmann's principal statement that the American antitrust experience has been much more successful in dealing with the problems of agreements in restraint of trade than with the monopoly problems is no doubt factually correct. But his reasoning is surprising to say the least. He says that the "rule of reason" was applied by the Supreme Court only to "capitalistic combinations" (mergers, etc.), but not to contractual restraints. On page 95 he states as a reason for this alleged attitude of the Court: "A contractual combination is per se directed at market control, while, in the case of a holding company or outright consolidation, it is presumed that they aim at technological and economic improvement—and that market control is only an accidental by-product." Obviously Engelmann was misled by the fact that the "rule of reason" was formulated in a "monopoly" case. But a careful reading of the price cases should have clarified this point. His error in interpreting the "rule of reason" leads necessarily to doubtful conclusions as to "per se" violations of the Sherman Act.

Engelmann's discussions of procedural points illustrate the great difficulties which a civil-law lawyer has in understanding the American "procedural machine." The grand jury is not mentioned. The relationship between criminal and equity proceedings initiated by the government and the interrelationship between administrative agencies and courts do not clearly appear in the book.

A brave man has taken the first step. He has given the German reader a tool to work with. But the tool is rather crude and requires thorough sharpening. Admittedly, it is difficult to study a foreign economic order and its legislation without bias. It is also difficult to collect foreign books, especially if they are not consistent with one's own views. But comparative writers have to succeed; otherwise their studies may become political briefs, justifying their own institutions at the expense of the foreign order.

Co-operation between an institute of the high standing of the Tübingen Institute with the editors of The *American Journal of Comparative Law* should help future research to reach even better results.

H.K.

RIST, C.,[1] *Histoire des doctrines relatives au crédit et à la monnaie depuis John Law jusqu'à nos jours*. Paris: Librairie du Recueil Sirey. Second Edition, 1951. Pp. 540.

The publication of a second French edition[2] of Professor Rist's classic work on the history of economic doctrines relating to money again calls attention to the influence of monetary theory on monetary law. Developments in the law relating to money have sometimes received strong impetus from advances made in the economic analysis of the nature of money and credit. It may be expected that, as a result of the publication of works such as the book under review, lawyers will abandon many of the stale economic doctrines which linger on in opinions and legal treatises long after they have been discarded by the majority of economists.

"I do not intend to give the history of books or of men," promises the author, "but that of ideas." This involves not only a conceptual rather than a chronological organization of the material, but results in an analytical approach. Professor Rist describes critically past and present theories against the background of his own views. It is a readable and vivid account of the theories and misconceptions during the past century and a half. The book opens with a

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[1] Born in Frilly, Switzerland in 1874, Charles Rist was professor of economics at the Law Faculty of the University of Paris, vice-governor of the Banque de France, co-author (with Charles Gide) of the *History of economic doctrines from the time of the physiocrats to the present day*, one of the most widely used texts on the subject in Europe, and is the author, among other publications, of the controversial volume *La déflation en pratique* (Paris, 1924).

[2] English translation of the first edition was published, in 1940, in London by George Allen & Unwin; Spanish translation, in 1945, by Compañía Editorial Nacional, Mexico; German translation, in 1946, by Louis Francke, Bern.

description of the doctrines of the eighteenth century which incorporated everything that had been said during the preceding two hundred years (plus confused ideas caused by the appearance of credit instruments) and which are still being taught by prophets of John Law, Cantillon, Adam Smith and Le Comte Mollien. After a chapter on the doctrines concerning the influence of gold and silver on the formation of prices and interest rates, and a chapter on Thornton, Ricardo and the "Bullion Report", Rist deals with the contrast between the approach of Tooke and Ricardo. Gold production and price movements between 1850 and 1936 is the next theme, followed by a discussion of the effect of gold movements and discount rates on prices. An analysis of the general theory of money advanced at the beginning of the twentieth century is followed by a discussion of the theories relating to central banks. The last chapter deals with monetary theories between 1940 and 1950.

The second edition of the book differs from the first (published in 1938) mainly in the addition of the last chapter on developments during the decade of World War II. Some passages in the first edition have been made more lucid.

JOSEPH DACH

PARKER, R., *Administrative Law*, Indianapolis: Bobbs-Merrill Company, Inc., 1952. Pp. 344.

This concise text reflects the author's viewpoint that a principal concern of administrative law is to assure that the executive branch of the government may adequately perform its functions. The doctrines of administrative law, the author declares in his preface, are designed to protect the efficient operation of government, and not merely to protect individuals from threats of governmental oppression.

The volume comprises six sections, devoted respectively to (1) fundamental questions involving separation of powers and the due process clause; (2) the establishment, organization, and jurisdiction of administrative agencies; (3) a study of procedural requirements in rule-making activities and adjudicatory functions, with an analysis of the legal effects of rules and of administrative decisions; (4) judicial remedies—only some 25 pages being devoted to this well-plowed ground; (5) enforcement of administrative decisions; (6) damage claims for wrongful administrative acts.

The discussion is directed primarily to the federal agencies, although some state court cases are cited.

Included in the first section is a critical study of the Federal Administrative Procedure Act. The author concludes that while the Act was intended to establish a greater degree of uniformity and standardization of the various administrative procedures and to do away with certain abuses of administrative power, yet in fact "it neither codifies the previously existing law nor produces much improvement." (p. 80).

Indicative of the general tenor of Professor Parker's study are his views on

some of the much-mooted problems encountered in the administrative law field. He concludes, for example, that courts no longer exercise a judicial review power on applications for enforcement of agency subpoenas; that the separation of functions required of the N.L.R.B. by the Taft-Hartley Act has been an unsuccessful experiment which is not likely to be repeated; that one of the most important functions of agencies is "regulatory administration"—a process distinct both from rule-making and from adjudication.

FRANK E. COOPER

Book Notices

BOUTERON, J., ET PERCEROU, J. *La Nouvelle Législation française et internationale de la Lettre de Change, du Billet à Ordre et du Chèque, avec un exposé sommaire des principales législations étrangères. Vol. II: Chèque.* Paris: Librairie du Recueil Sirey, 1951. Pp. xii, 347.

This is the companion volume on Checks to the one on Bills and Notes brought out before the war by the French Delegates to the Geneva Conferences on the Unification of Negotiable Instruments Law. The volume gives a commentary on the Uniform Law on Checks as introduced in France as well as a commentary on the Geneva Convention on Conflict of Laws regarding Checks. The survey of foreign legislations, which is added, covers the countries which have adopted the Uniform Law. It includes an essay by Professor Gutteridge on the English law of Checks. Neither the law in the United States nor that in Latin America are treated. K.H.N.

GÉNY, F. *Ultima Verba.* Paris: Librairie Générale de Droit et de Jurisprudence, 1951. Pp. 64.

This little brochure, publishing the "intellectual testament" of the venerable French jurist in his eighty-ninth year, contains a concise resumé of the development and purposes of the author's contributions to the interpretation of private law. H.E.Y.

O'SULLIVAN, R. *The Inheritance of the Common Law.* The Hamlyn Lectures. Second Series. London: Stevens & Sons, 1950. Pp. viii, 118.

Four diffuse lectures: on the concept of man in the Common Law—"stalwart, independent, self-reliant"; the family in English law; the development of the British constitution, in which the author finds the modern doctrine of Parliamentary Omnipotence to be inconsistent with principles on which the Common Law was founded; and the place of conscience in law. H.E.Y.

STERN, S. *The United States in International Banking.* New York: Columbia University Press, 1951, Pp. xiii, 447 (including bibliography and index).

This worldwide survey, by a recognized expert, contains much legal material and the vital background for understanding many legal problems involved in international finance, banking and currency. P.J.E.

Tratado Elemental de Derecho Comercial. Contratos y Papeles de Comercio. 2 v. Buenos Aires: Tipográfica Editora Argentina, 1951.

Apart from its treatment of Argentine commercial law, by a leading authority, the comprehensive multilingual bibliography, vol. 2 pp. 819–901 is of particular interest to the comparatist. P.J.E.

DE SOLA CAÑIZARES, F. – AZTIRIA, E. *Tratado de Sociedades de Responsabilidad Limitada en Derecho Argentino y Comparado.* Buenos Aires: Tipográfica Editora Argentina, Tomo I, 1950, 709 pp. Bibliography pp. 64–103.

This is the most complete study yet published in any language on the limited liability firm. Volume II is in preparation. P.J.E.

MALAGARRIGA, C. C. *Tratado Elemental de Derecho Comercial,* 4 vols. Buenos Aires: Tipográfica Editora Argentina, 1951. I—Comerciantes-Sociedades, p. 1050; II—Contratos y Papeles de Comercio, p. 960.

Aside from its interest as an exposition of Argentine Commercial law by the country's leading authority, this book is of especial value to the com-

paratist for its exhaustive multilingual bibliographies; I, segunda parte, 923–1000; II, segunda parte, 839–901.

P.J.E.

MEZZERA ALVAREZ, R. *Curso de Derecho Comercial*, segunda edición Tomo I. Generalidades. El Comerciante. Montevideo, Organización Medina, 1951, 272 p. The first part includes comparative material.

BARRIOS DE ANGELIS, D. *El juicio de Expropiación*, Montevideo: Editorial M.B.A. 1951, pp. 211; bibliography p. 17–22.

Treatise on condemnation proceedings in Uruguay, with copious use of foreign literature.

WINIZKY, I. *Responsabilidad Penal de las Personas Jurídicas Mercantiles*. Buenos Aires: de Palma, 1951, pp. 88. Bibliography 87–88.

The title of this booklet is misleading. It does not deal with the question, still mooted in Latin America, of whether a business corporation can be held guilty of a crime. It treats solely of the interpretation of the badly drafted Article 301 of the Argentine Penal Code of 1922, which makes it a prison offense for a director, manager or administrator of a stock company, etc., to lend his co-operation or consent to acts contrary to the governing articles of association, laws or ordinances whereby the company, etc., becomes unable to meet its obligations or its dissolution is entailed. Construing the article restrictively, and especially in view of its origin in the Penal Code (1881) of the Netherlands, the conclusion is that the article imposes criminal liability only on officers or directors who wilfully or fraudulently violate the rules which govern their specific duties as such and thereby directly cause dissolution. P.J.E.

SERRANO TRASVIÑA, J. *Aportación al Fideicomiso*. Mexico: Semanario de Derecho Mercantil y Bancario. Serie A. No. 32, Universidad Nacional de México 1950, pp. XIV, 382.

Under the modest title of "Contribution to the Trust," this volume is a useful addition to the already substantial literature in Mexico comparing our trust and the Mexican *fideicomiso*, which was avowedly adopted from the trust. The author's purpose is to seek and analyze the fundamental nature or essence of the institution, a theme, the author believes, which has not received due attention from Anglo-American writers. Six of the ten chapters are devoted to our trust and give a generally correct picture of our law for the benefit of Latin-American readers. The first chapter is introductory, the second deals with the Roman law and the civil law doctrine, chiefly Italian, of the fiduciary transaction (*negocio fiduciario; negozi fiduciari*), the last two chapters more specifically discuss the Mexican *fideicomiso*, including the scanty decisions. The author concludes that in all vital aspects the express trust and the Mexican *fideicomiso* are identical; the differences are of minor importance and do not go to the essence which he formulates as "a legal transaction whereby the mode of exercise of the rights destined to its attainment transform such rights from optional (potestative) to obligatory by virtue of a legal duty imposed on their holder." He voices the sound opinion that the express trust can be adopted and function effectively in a civil law system and without the necessity of a dual jurisdiction of law and equity.

He is not quite so happy when he essays, in formulating the essence of our trust (e.g. when discussing the nature of the beneficiary's rights) to put this flexible, evergrowing institution into a castiron mould of civil law theories of property incompatible with our view of what the law is. The book illustrates one of the differences of method between the two systems—Civil and Common Law; the insistence

upon logic and cleancut scientific principles in the one system; the stress on experience and practical results, at the expense of rigorous theory, in the other. P.J.E.

El actual pensamiento jurídico Norteamericano. Buenos Aires: Editorial Losada, 1951, pp. 333.

This is the latest in the legal philosophy series of Argentine writers and translations of foreign works issued by the Argentine Institute of Legal and Social Philosophy, of which Dr. Carlos Cossio, Latin America's most eminent legal philosopher, is president and inspiring genius. Of the eight essays, six (Cairns, Hall, Cowen, Patterson, Kelsen, and Chroust) are from Interpretations of Modern Legal Philosophy, Essays in Honor of Roscoe Pound (1947); one by Pekelis appeared in 2 Social Research (1944) under the title "The Case for a Jurisprudence of Welfare"; the remaining one is Jerome Frank's "Words and Music", 47 Columbia Law Review (1947).

The translations—no easy task—are competently done by several hands. Each reader will have his own opinion as to whether the selections are as fully representative of contemporary American thought as might be desirable, especially of the underlying philosophies of American lawyers and judges. Be this as it may, the book is a praiseworthy contribution towards cultural rapprochement between North and South and a fitting counterpart to Kunz's Latin American Legal Philosophy, a translation of which has also been issued by the Institute. A selection from Roscoe Pound's writings is now in preparation and further translations of our legal philosophers are in the offing. P.J.E.

LAWSON, F. H. *The Rational Strength of English Law.* London: (Stevens & Sons) 1951, VIII, 147 p. 10 s. (The Hamlyn Lectures Third Series).

The main object of the Hamlyn Trust is the furtherance of the knowledge of Comparative Jurisprudence "to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples." Despite this, the author (Professor of Comparative Law at Oxford, and author of the valuable "Negligence in the Civil Law") does not "look upon English Law with an uncritical eye". "I shall try", he says, "to achieve clarity and give relief to my discussion by an extensive use of the comparative method." He more than succeeds. The four lectures are a model of lucid exposition, sustained interest and shrewd analysis and appraisal.

Contrary to superficial impressions abroad, he finds English Law to be a rational and on the whole logical system. "Where English law seemed to go wrong it was nearly always through an excess rather than a defect of logic" (p. 70). The lectures deal with Sources and General Character of the Law, Contract, Property, and Torts. The present-day English law of real property comes in for the author's highest commendation, in contrast to the clear-cut concepts, on the surface merely, of the Civil Law and to the United States "where the law of real property remains a jungle" (p. 144). Elsewhere, it is a bit startling to find a large measure of praise for American law, in such matters as conditional sales, documents of title, registration, torts, the use of equitable institutions for the development of the law. There is room for equitable principles in every system and the distinction between law and equity should not be wholly eliminated. The limits for successful codification are well indicated. The relative merits of the common law and the civil law in many other aspects are clearly set forth. English law, he concludes, is not only rational but strong.

It is a fascinating little book, remarkably easy to read, yet profound, that can be commended not only to

professional comparatists but to all lawyers. P.J.E.

FRAGA IRIBARNE, M. *La reforma del Congreso de los Estados Unidos.* La L.R.A. de 1946. Madrid: Ediciones Cultura Hispánica, 1951, pp. 608.

"One of the most important studies published in Spanish, of concrete themes of comparative constitutional law." 38 Revista de Estudios Políticos. Año XI, Núm. 58 (1951) 135. Extensive bibliography.

ESCARRA, J. *Cours de Droit Commercial.* Nouvelle édition. Paris: Sirey 1951, pp. 1196.

A complete revision and amplification of the author's Manuel de Droit Commercial, published in 1947. Important new laws, including some passed in 1951, are discussed. In addition to a chapter on foreign systems of commercial law, it contains frequent references to other countries, including England and the United States. P.J.E.

SCHWARZ-LIEBERMANN VON WAHLENDORF, H. A. *Vormundschaft und Treuhand des römischen und englischen Privatrechts.* Tübingen: J. C. B. Mohr (Paul Siebeck), 1951. Pp. 141.

This work presents a comparative study of the basic, functional similarities of the institutions of *tutela* and *fiducia* in the Roman law, on the one hand, and on the other, of guardianship and trusteeship in the English and also German, laws. These institutions, fundamentally and primarily pertaining to private law, are treated by the author as examples demonstrating his basic thesis that the "integration" of social relations is attended by a corresponding development of "juridification" of legal forms, first on the intrastate and national, and later on the interstate and international level. In the course of this process, institutions of private law become institutions of international law and as such are integrated into the binding norms of the universal legal conscience (*Weltrechtsgewissen*) of a "one world" legal order. Thus, the author conceives the present military occupation of Germany by the allied powers as specifically fiduciary in character, i.e. as the *international* form of guardianship and trust. V.B.

BALOGH, E. *Adaptation of Law to Economic Conditions According to Roman Law.* Estratto de Atti del Congresso Internazionale di Diritto Romano e di Storia del Diritto, Verona, Settembre 1948. Milano: A. Giuffrè, 1951. Pp. 263–355.

This study demonstrates with convincing clarity, and an overwhelming wealth of references, the subtle changes in the Roman *ius civile* caused by the expansion of the Empire and the simultaneous complication of economic interrelations. The legal institutions which the author treats as demonstrating this adaptation of law to changing economic conditions are the *peculium*, the *fenus*, and the agrarian legislation. The description of the intrusively expanding influence of the *ius gentium* on the strict forms of the *ius civile* is a valuable part of this study. V.B.

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Bulletin

Special Editor: KURT H. NADELMANN
American Foreign Law Association

GREETINGS

It is fitting that the American Foreign Law Association should contribute a word of welcome to the new American Journal of Comparative Law. The establishment of such a periodical has long been an aspiration of the Association. It can take pride in the fact that its Bulletins, published in 1950 and 1951, modest as they were, helped to pave the way for the Journal and that it took an active part, as one of the earliest sponsors, in formulating the final plans and in helping to reconcile divergent points of view among the other sponsors, the leading law schools of the country. To them and not to the Association, credit for the successful outcome is due.

The Association however, has a continuing task and responsibility. Since its membership includes practitioners as well as teachers, it is peculiarly able to make significant contributions to the joint undertaking. The emphasis of the Association is primarily on foreign law, but comparative law is interwoven so inextricably with foreign law that any attempted separation is pointless. The comparative method is sterile if not based on a thorough knowledge of other systems of jurisprudence, not alone in their generalities, but in detailed application. On the other hand, the work of the expert in foreign law is of little value if he is unable to explain it to courts, commissioners, clients, and clients' counsellors in terms of our own law. The Journal, in our opinion, would defeat high hopes if it were confined to theoretical discussions and failed to meet the needs of practitioners. There can be no substantial conflict between high scentific standards and the realities of daily life. The significance of foreign law in practice is amply shown by the large list of cases in the reports, as published in our previous Bulletins, dealing with foreign law. Their number is small in comparison with the unreported cases and the vast volume of unlitigated matters that crowd upon law offices in these days of expanding international relations. The success, then, of this American Journal will depend upon the joint efforts of practitioners and professors. Each member of the Association should personally assume the duty of promoting the success of the Journal. Committees are being appointed to channel, and make available to the Editorial Board, the resources of the membership of the Association.

The Journal, as an indispensable source of information, should fill a need long felt by all interested in foreign and comparative law. Its publication will not diminish the other activities of the Association. These cannot fail to develop

with the ever-increasing importance of foreign law for this country. The Journal will be an added stimulus.

We extend our felicitations and wishes for durable success.

AMERICAN FOREIGN LAW ASSOCIATION
PHANOR J. EDER, *President.*

REPORTS

THE AMERICAN ASSOCIATION FOR THE COMPARATIVE STUDY OF LAW, INC.—In order primarily to provide for the publication of the American Journal of Comparative Law and to enable the business affairs of the enterprise to be conducted efficiently on a joint basis, the American Association for the Comparative Study of Law, Inc. was incorporated as a membership corporation under the laws of the State of New York.

The certificate of incorporation, dated as of May 12, 1951, was approved by the Hon. William C. Hecht, Jr., a Justice of the Supreme Court of the State of New York, First Judicial District, on June 12, 1951, and was filed in the office of the Secretary of State of New York on June 15, 1951. Organization meetings of the members and of the Board of Directors were held on July 17, 1951, and by-laws adopted.

The activities of the Association are not limited to the publication of the Journal. "The purpose for which the corporation is formed", as set forth in the certificate of incorporation, "is to promote the comparative study of law and the understanding of foreign legal systems; to establish, maintain and publish without profit a comparative law journal; and to provide for research and the publication without profit of writings, books, papers and pamphlets relating to comparative, foreign or private international law."

No part of its net earnings shall inure to the benefit of any private individual, and no part of its activities shall consist of carrying on propaganda, or otherwise attempting to influence legislation.

As a nonprofit corporation, it will be qualified to receive gifts not only to support the Journal but also to provide for the special needs of comparative legal research and for publications as contemplated in its purpose. The accomplishment of this purpose, essential for the progress of the law and for the furtherance of international understanding, deserves the support of the Bar and of an enlightened public.

The principal class of members of the Association is composed of the institutional sponsor members. Any school or institution devoted to comparative, foreign, or international law, any member school in the Association of American Law Schools, bar association, or other school, institute, association or corporation, deemed by the Board of Directors to be qualified, may be elected a *sponsor member*.

Any individual, law firm, corporation or association may be elected a *sustaining member*. Sustaining members shall each pay $100 annually as dues. Law schools not applying for election as sponsor members may be elected sustaining members on such terms as the Board of Directors may determine.

Any individual member of the legal profession or member of the faculty of any sponsor member of the Association or of a member school in the Association of American Law Schools may be elected an *associate member*. The present dues of associate members as fixed by the Board of Directors are $25 annually.

Provision is also made for *corresponding members* abroad.

The Board of Directors is elected annually. Not less than two-thirds of the number of directors, but not more than one nominated by any sponsor member, shall be elected from the nominees of the sponsor members.

The Board of Directors as at present constituted consists of:

Messrs.

David F. Cavers, Harvard Law School

Alexis C. Coudert, Parker School, Columbia University
Miguel A. de Capriles, New York University Law School
Joseph Dainow, Louisiana State University Law School
Phanor J. Eder, American Foreign Law Association
Jerome Hall, University of Indiana Law School
Heinrich Kronstein, Georgetown University Law School
Myres S. McDougal, Yale University Law School
Russell A. Rasco, University of Miami Law School
Max Rheinstein, University of Chicago Law School
Hessel E. Yntema, University of Michigan Law School

The officers are: President: Phanor J. Eder (74 Trinity Place, New York City); Vice-President: Hessel E. Yntema (University of Michigan Law School, Ann Arbor, Mich.); Treasurer: David F. Cavers (Harvard Law School, Cambridge, Mass.); Secretary: Alexis C. Coudert (488 Madison Avenue, New York City).

AMERICAN FOREIGN LAW ASSOCIATION—The membership of the Association steadily increased during the year 1951.

Since the issue of the Spring 1951 Bulletin addresses were delivered at meetings in New York by Dr. Uri Yaden, Deputy Attorney General of Israel and Director of Legal Planning on "Israel Law in the Making," and by Mr. Alexis Coudert, the representative of the Association on the UNESCO International Committee for Comparative Law, on the meeting held in Paris, and on the Committee's activities. The Association joined with the Section of International and Comparative Law of the American Bar Association in a meeting devoted to the discussion of recent important cases involving foreign law.

The organization of a branch at Miami, under the initiative of Mr. David S. Stern of the University of Miami, was completed, and it is now functioning. The Chicago branch has also continued its activities.

Several new committees of the Association have been appointed to further liaison with similar organizations abroad and to co-operate with the Editorial Board of the American Journal of Comparative Law.

PHANOR J. EDER

Note: At the Annual Meeting of the Association on February 28, 1952, three members of the General Council, Class of 1955, were elected: Phanor J. Eder, Jerome S. Hess, David E. Grant; the other members are William F. Delaney, Jr., Otto Schoenrich, Otto Sommerich, Class of 1953, and Leslie E. Freeman, Arthur K. Kuhn, Max Rheinstein, Class of 1954. Mr. Harold Smith has become President of the Association; Grier Bartol and Hessel E. Yntema were reelected Vice-Presidents, Victor C. Folsom, Treasurer, and Albert M. Herrmann, One Wall Street, New York 5, N. Y., Secretary.

A. F. L. A. CHICAGO CHAPTER—The Chicago Chapter of the American Foreign Law Association held its organizational meeting on March 2, 1951, and adopted its formal by-laws on December 14th.

The Chapter held four regular meetings and, in addition, had one meeting jointly with the International and Foreign Law Committee of the Chicago Bar Association and another with the University of Chicago Law School. Those who addressed the Chapter included Mr. Dwight Hightower, attorney, who spoke on "Corporate Forms of Doing Business in Latin America"; Mr. Wm. S. Barnes of the Harvard Law School, whose paper dealt with the demand in the United States for information on foreign law; Prof. René David of Paris, who described a French lawyer's impressions of American law; and Prof. Max Rheinstein of the University of Chicago, who related his experiences on a recent trip to Germany and the Scandinavian countries.

ANTONIO R. SARABIA

SECTION OF INTERNATIONAL AND COMPARATIVE LAW, AMERICAN BAR ASSOCIA-

TION—Study and recommendation on foreign law matters of concern to practitioners have continued to concern the Comparative Law Division of the Section over the past year. A breakfast was sponsored jointly with the American Foreign Law Association in September, 1952. The New York breakfast discussed (1) restraints on the transmission of legacies abroad (In re Url's Estate, 7 N. J. Super. 455, 71 Atl. 655 (1950), and (2) the application of laws of non-recognized governments in the courts of the United States (Latvian State Cargo Co. v. McGrath, 188 F (2d) 1000 (App. D. C. 1951).

Seven committees of the Division continued to be active, while an eighth on Near Eastern law underwent reorganization following the death of its founder. The principal matters concerning the committees were: pressing for the opening of a Far Eastern Law Center in the Library of Congress (Far Eastern Law); conducting a pool on teaching of comparative law in American Law Schools and examining proposals for a treaty to unify conflict of laws rules (Comparative Civil Law and Procedure); urging signature of the U. N. Convention on the International Transmission of News and the Right of Correction (Freedom of the Press and Freedom of Speech); studying the admiralty laws of the Latin-American States (Latin-American Law); studying the problems raised by the revision of laws of war (Military, Naval and Air Law); and reporting on the status of private claims against Satellite States under the Peace Treaties (Private Claims against Governments). A general committee of the section on teaching both international and comparative law reported on the prospects for and advantages expected to accrue from extension of comparative law teaching.

The Proceedings of the Section are published annually and are available to members and Law School Libraries.

LYMAN M. TONDEL, JR.

COMMITTEE ON COMPARATIVE LAW, ASSOCIATION OF AMERICAN LAW SCHOOLS—The Committee on Comparative Law of the Association of American Law Schools completed its first year as an entity independent of the International Law Committee in December 1951. Two major activities concerned the Committee: preparation of a report on legal education in the United States for the International Committee for Comparative Law, and development of a program for the Denver meeting of the Association in December 1951, to demonstrate the value of the comparative law method in studying matters of substantive law. In addition the Committee continued its encouragement of the teaching of comparative law in American law schools and gave its support to the establishment of the American Journal of Comparative Law.

To prepare the report on legal education in the United States, the Committee augmented its number from specialists on the subject, taking particular precautions to include experts trained abroad as well as in the United States. In consequence the report finally submitted to the international *rapporteur*, Professor Niboyet of France, explains the American system, not only in terms of what it is, but what it is not. To the Committee this seemed important because of the many aspects a foreign scholar might assume to be a part of the American system, when a real difference exists.

The Denver Christmas meeting included two panels, one on "Social Security and the Law" and the other on "Collective Bargaining and Industrial Peace". Pertinent experience of Europe was examined in an effort to determine whether future trends and possible pitfalls in the law of the United States might be anticipated. As such it was the first panel discussion within the Association of substantive matters now on the frontier of the law in which the comparative method of analysis was utilized.

JOHN N. HAZARD

COMMITTEE ON FOREIGN LAW, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK—The principal work of the Com-

mittee during 1951–1952 has been: (1) a study, report and recommendations on the implementation of provisions contained in Treaties of Friendship, Commerce, and Navigation for the protection of American property abroad against expropriation (done jointly with the Committee on International Law); (2) continuation of efforts to cause adoption of court rules or of legislation in New York for the improvement of procedure for taking interrogatories in a foreign language; (3) symposium for members of the Bar on Immunity of Sovereigns when Engaged in Commercial Activities; (4) sponsorship of Lectures and gatherings at the Association to establish closer relationship between the Association and foreign attorneys visiting New York or attached to the United Nations in New York City.

DUDLEY B. BONSAL

INTERNATIONAL COMMITTEE OF COMPARATIVE LAW—The Bureau of the International Committee of Comparative Law held its annual meeting in Paris on October 4 and 5, 1951. Five of the seven members of the Bureau were present together with several others engaged in carrying out projects previously initiated by the Committee. Dean Julliot de la Morandière was elected President and Professor René David was designated Secretary General. Three new National Committees were admitted to membership, thus making a total of eighteen countries represented in the Committee. They are: Argentina, Austria, Belgium, Brazil, Chile, Egypt, France, Germany, Greece, Haiti, Italy, Nicaragua, Peru, Spain, Sweden, United Kingdom, United States of America, Uruguay.

The meeting concerned itself primarily with a review of the work already in progress and the consideration of new projects designed to effectuate the Committee's purpose of "encouraging throughout the world the study of foreign legal systems and the use of the comparative method in legal science." Professor Niboyet, Reporter General for the study of legal education in eight major countries, advised the Bureau that his report, embodying the conclusions derived from information submitted by the national reporters, would be available early in 1952 for submission to UNESCO. Messrs. Ancel, Lipstein and de Sola Canizares reported that substantial progress had been made by them and Mr. William S. Barnes in the preparation of a Catalogue of Sources and Documentation for most countries of the world. The catalogue will contain a description of the principal sources of information relating to Codes, legislation, administrative regulations, and judicial decisions, together with a list of law centers and legal publications.

The Bureau decided to commence as soon as possible the preparation and publication of legal bibliographies for various countries, a bibliography of French law to be first prepared as a model for the others, which are to follow at the rate of five each year. It was further agreed that the Committee should arrange for the preparation of basic introductions to the laws of various countries. The plan calls for the publication during the next three years of volumes dealing with France and Denmark, Norway and Iceland (in English), and with Spanish law and Soviet law (in French).

The next meeting of the Bureau will occur in Cambridge, England, at the time of the fortnight of Comparative Law planned by the University of Cambridge for July 1952. A discussion of the various reports on the teaching of law will be conducted by the Bureau with the aid of guests invited by Cambridge.

ALEXIS COUDERT

CONFERENCES

UNION INTERNATIONALE DES AVOCATS—The Thirteenth Congress of the "Union Internationale des Avocats" was held in Rio de Janeiro from September 7 to September 12, 1951. This was the first occasion of the Union's meeting outside of Europe since its organization.

Mr. Pendleton Beckley of the United

States addressed the Congress on "Some Aspects of the Difference between the Anglo-American and the Latin Law with reference to the Jury, the Proof, and the Supreme Court of the United States." Mr. George H. Owen of the United States read a paper on "Present Methods of International Cooperation in Civil Proceedings." Mr. Nicholas Doman of the United States spoke in connection with the topic "International Action for Repression of Common Crimes", referring to the Nuremberg trials as a milestone in the development of international law in the field of repression of crimes.

SEVENTH INTER-AMERICAN BAR CONFERENCE—The Seventh Conference of the Inter-American Bar Association was held in Montevideo, Uruguay, November 21 to December 2, 1951. Fifty delegates from the United States were included in the approximately 450 delegates who registered for the Conference. The Colegio de Abogados del Uruguay, the host Association, arranged a very interesting program of official and social activities for the delegates.

23 Committees considered the 200 papers presented for action at the Conference. The papers from American delegates are listed below.[1] The protection of Patents, Trade Marks, and Copyrights received particular attention and important developments in these fields may be expected as a result of the presence of the Commissioners of Patents from several countries of this Hemisphere, and Dr. François Hepp representing UNESCO. Another significant event was the organization of a Junior Bar Section to stimulate participation of young lawyers in the work of the Association.

114 Resolutions were adopted, among which may be mentioned a resolution favoring the right of Asylum; the protection of individual rights by the judiciary on the basis of Constitutional provisions, and the project for a Uniform Law of Trusts prepared by Dr. Ricardo J. Alfaro of Panama, with a view to its adoption by the nations of this Hemisphere. The Round Table conducted by Dr. Eduardo J. Couture, President of the Association, at the Law School of the University of Uruguay on methods of legal education produced some interesting discussions.

The Eighth Conference is to be held at Caracas, Venezuela, during 1953,—the exact date to be fixed after advice is received regarding the date for the Tenth Pan American Conference of American States.

WILLIAM ROY VALLANCE

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[1] List of papers presented to the Montevideo Conference from the United States:

LOUIS M. HOPPING: The convenience of forming an Inter-American Institute of Immigration pursuant to a resolution of the VI Conference, Inter-American Bar Association, Detroit.

HENRY F. HOLLAND: The Juridical Status of the Continental Shelf.

DOROTHY ROTH WILSON: Potential conflicts between international and domestic law in "Point Four" projects.

——: Bilateral technical cooperation in the Western Hemisphere.

ETHEL BEATRICE FOX: "Caloroso perseguimientos" development.

KURT H. NADELMANN, *et al*: Report on a model or uniform law respecting the treatment of creditors and the realization of assets in bankruptcy affecting creditors domiciled and property situated in different countries (Detroit Resolution).

PHILADELPHIA BAR ASSOCIATION: Requisites of uniformity in the regulation of bankruptcy and business failure, including provisions for non-discrimination against alien creditors.

GEORGE H. OWEN: Service of Process abroad.

FRANK KELLY: The participation of the legislative branch in the conduct of foreign affairs: a comparative study.

MADELINE C. DINU: Property rights of common law marriage and concubinage in America.

DONALD CHEATHAM, *et al*: Review of patent working provisions in Latin American countries.

MERWIN F. ASHLEY: Committee on taxation of patents.

INTERNATIONAL CONGRESS OF JURISTS IN LIMA—The University of San Marcos in Lima, Peru, for the purpose of celebrating the 400th anniversary of that distinguished institution, organized a Congress of Jurists which was held from the 8th to the 18th of December, 1951 in Lima. Several of the American delegates to the Inter-American Bar Conference in Montevideo attended also the Lima Congress.

SEVENTH HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW—After a pause of 23 years, another Conference on Private International Law took place at the Hague from October 9 to October 31, 1951. This Conference, the VIIth, was attended by seventeen nations invited by the Government of the Netherlands: Austria, Belgium, Denmark, Finland, France, West Germany, Great Britain, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, and Yugoslavia. Yugoslavia had only observers. The British delegation took part in the discussions but without the right to commit its government. The United States, which had not participated in the earlier conferences, was not invited. Except for Japan, all participants were European countries.

The principal item on the agenda of the Conference was a draft convention on Conflict of Laws regarding International Sales of Goods. This convention was signed by fifteen European countries and Japan. The principle of the convention is that, unless otherwise stipulated, a sale is governed by the law of the country where the seller is domiciled.

Two other items on the agenda were disposed of by the conference. A draft convention on the Recognition of the Status of Foreign Corporations was approved by fourteen nations, with

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ROBERT E. WOODHAN: Interim report of panel on interchange of information.

ARTHUR B. BAKALAT, S. DEVALLE GOLDSMITH, AND VERNON A. PETERSON: Review of patent working provisions in Latin American countries.

WALLACE H. MARTIN: Proposals for uniform Trademark Law.

MERWIN F. ASHLEY: Considerations on patent taxes.

PHANOR J. EDER: Consideration of the Pan American Convention for simplification and uniformity of powers of attorney in international trade.

PAN AMERICAN UNION: Consideration of Pan American Convention for simplification and uniformity of powers of attorney in international trade.

BENJAMIN W. YANSEY: Consideration of the 1950 York-Antwerp Rules for settlement of general average.

L. DE GROVER POTTER: A discussion on laws of the United States providing for exemption from liability of water carriers for loss or damage to cargo.

ELLA GRAUBART: Comments on draft for a uniform Law of Trusts.

JUSTIN MILLER: Principles of law to be followed in limitations upon radio transmission.

——: Address to the II General Assembly of Inter-American Broadcasters Association.

MITCHELL B. CARROLL: Proposals of general principles of substantive and adjective law in the tax legislation of the American Republics.

ANDREW B. YOUNG: Prospects for uniformity in fixing depreciation and depletion allowances for income tax purposes.

E. ROY GILPIN: The problem of the revaluation of assets for tax purposes due to devaluation of the currency.

ALBERT MACC. BARNES AND WILLIAM SPRAGUE BARNES: Report on standard law for the suppression of smuggling (Resolution of the Detroit Conference).

EILEEN C. O'CONNON: Drugs, narcotics and standard statute on smuggling.

ELLA COOPER THOMAS: Organization and financing of a periodical relating to American law.

HELEN L. CLAGETT: Report on the Center of Latin-American Legal Studies in the Law Library of Congress.

RACHEL WOODY HAYNES: Methods of collaboration of junior lawyers in national and international professional organizations.

CUTHBERT S. BALDWIN: Development in the control of unauthorized practice of law.

Sweden and Portugal abstaining. A draft convention on Renvoi was approved by eleven states; France, Italy, Denmark, Norway, and Sweden abstained.

A Permanent Bureau of these Conferences has been set up at The Hague. Contacts with the Council of Europe have been established.

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW—In order to examine a draft uniform law on international sales of goods prepared by the International Institute for the Unification of Private Law, located in Rome, Italy, an international conference was held at the Hague in November 1951, immediately following the VIIth Conference on Private International Law. Representatives of twenty-two governments and the observers of three other governments, as well as of the United Nations and the International Chamber of Commerce, took part in the Conference. The United States was represented by an observer. A final Act was signed by which the draft was taken as a basis for further study; a working committee of ten was appointed to revise the draft in the light of the discussions at the meeting. The revised text will be submitted to another conference.

ANNOUNCEMENTS

INTERNATIONAL CONFERENCE OF THE LEGAL PROFESSION, *Madrid, July 16 to 23, 1952*—The Fourth International Conference of the legal profession under the auspices of the International Bar Association will take place in Madrid in the Palace of Justice from July 16 to 23rd, 1952. Members of the legal profession throughout the world have been invited to attend and to communicate with the Program Committee, Edward V. Saher, Chairman, 501 Fifth Avenue, New York 17, N. Y. Topics to be discussed in Madrid: (Plenary Sessions) Domestic Relations; Proposed Code of International Criminal Law, and Proposed International Criminal Court; (Symposia) Air Law; Character and Scope of Rights Asserted and Exercised over Coastal Waters and Appurtenant Subsoil; Copyright; International Economic Cooperation; International Fiscal Law; International Judicial Cooperation; Law of Trusts; Methods of Unifying the Law; Prize Law; Relationship between the Executive and the Judicial Powers.

FIRST SPANISH-PORTUGUESE-AMERICAN PENAL AND PENITENTIARY CONGRESS, *Madrid, July 6 to 11, 1952*—This Congress to which those attending the International Conference of the Legal Profession have been invited, will be held in commemoration of the Centenary of the introduction in Spain of the criminal final appeal (cassation). On the program: The Spanish Criminal Cassation; Judicial and Political Assistance in Criminal Matters; Treatment of Juvenile Delinquents; Hispano-American Penitentiary Institutions; Value of Psychomedical Diagnosis. Further information: Instituto de Cultura Hispanica, Avenida de los Reyes Catolicos (Ciudad Universitaria), Madrid.

UNIVERSITY OF CAMBRIDGE COMPARATIVE LAW FORTNIGHT, *Cambridge, July 21 to 31, 1952*—The University of Cambridge will hold a fortnight Conference on Comparative Law in the latter half of July, 1952, as part of a summer school devoted to comparative law with an enrollment of graduate law students from the civil law world. Several professors from the United States have been invited to attend. Different panels will discuss: Civil liability without fault; The protection of the person accused or suspected of crime or of conduct reputed prejudicial to the State; The handling of case law in different systems; Succession and the Administration of Estates; Labor Law. Another panel, under the responsibility of the International Committee for Comparative Law, will discuss reports on legal education prepared for UNESCO by authorities in eight countries.

INTERNATIONAL LAW ASSOCIATION CONFERENCE, *Lucerne, August 31st to September 6th, 1952*—The 45th Conference of the International Law Association will be held in Lucerne, Switzerland, from August 31st to September 6th, 1952. The program includes the following topics: Problems of Sovereignty and International Co-operation; Sea Bed; International Company Law; Insolvency; Family Relations; Monetary Law; State Immunity; Air Law; Trade Marks. Members of the American Branch should communicate with John J. Abberley, Secretary, 55 Liberty Street, New York 5, N. Y.

INTERNATIONAL JURIDICAL CONGRESS, *Quebec–Montreal, September 16 to 25, 1952*—In September 1952 Laval University, the oldest French university in America, will celebrate its centenary, as will also the Faculty of Law, one of the four original faculties. At the same time, the Association Henri Capitant pour la Culture Juridique Française will hold an international congress, the first part of which will coincide with the Laval centenary celebrations at Quebec, the second part to take place in Montreal.

Topics to be discussed in Quebec City, September 16 to 18: The evolution of the respective status of husband and wife; the problem of change in matrimonial regime; the stipulation in favor of a third party and its principal applications. Topics to be discussed at Montreal, September 23 to 25: Progress in the science and law of evidence; the concept of public order and good morals; the concept of natural obligation and its role in the civil law. In charge of arrangements: Marie Louis Beaulieu, K. C., 111 Mountain Hill, Quebec City, Canada.

INTERNATIONAL ACADEMY OF COMPARATIVE LAW, *Paris, August 1 to 3, 1952*—The Academy is to hold its annual meeting of members in Paris, August 1 to 3, 1952, to draw up the program for the Fourth International Congress of Comparative Law planned to be held in August, 1954.

VARIA

SOCIETY OF COMPARATIVE LEGISLATION, *London.*—Lord Justice Denning has become chairman of the Executive Committee. He wrote recently on "The Restatement of the Law: Its Place in the English Courts" (37 A. B. A. J. (1951) 329). The Journal of the Association and the "International Law Quarterly" will be combined and published under the title:... "Comparative and International Law Quarterly."

CENTRE FRANÇAIS DE DROIT COMPARÉ.—This Center located at Paris, created by the French Department of Justice, the Institute of Comparative Law of Paris, and the Société de Législation Comparée, has received official status by decree of April 2, 1951.

INSTITUTE OF ADVANCED LEGAL STUDIES, *University of London.*—According to the Fourth Annual Report of the Institute, the Survey of literature on American law available in the relevant libraries in Oxford, Cambridge, and London has been completed.

JAPAN INSTITUTE OF COMPARATIVE LAW.—This Institute, located in Tokyo and presided over by Professor Naojiro Sugiyama, now publishes its own Comparative Law Review.

INSTITUTE OF INTERNATIONAL AIR LAW, *McGill University, Montreal.*—This Institute in the city which houses the I. C. A. O. and the head office of the I. A. T. A., is headed by Professor John C. Cooper, of the Institute for Advanced Study, Princeton, N. J. Established by McGill University in its Faculty of Law, its purpose is to provide facilities for advanced study in international air law for qualified law graduates and for fundamental research in the field.

FACULTAD DE DERECHO, UNIVERSIDAD NACIONAL AUTÓNOMA DE MEXICO.—The

Escuela Nacional de Jurisprudencia which, some time ago, added to the curriculum the preparation for the doctorate in law, has changed its name to Facultad de Derecho. The Revista de la Escuela Nacional de Jurisprudencia has become the Revista de la Facultad de Derecho de Mexico.

INSTITUT HENRI VIZIOZ D'ÉTUDES JURIDIQUES, POLITIQUES ET ÉCONOMIQUES, *Fort-de-France, Martinique.*—This Institute which replaces the former École Préparatoire de Droit, is a branch of the Law School of Bordeaux and prepares for and awards the "licence en droit" under the same conditions as the law schools of metropolitan France.

NETHERLANDS WEST INDIES.—The "Vereeniging van Praktizijns der Nederlandse Antillen" has started publication in Curaçao of the *Antilliaans Juristenblad*, a quarterly.

CARIBBEAN LAW JOURNAL.—This new journal is published in Jamaica.

ANNALES DE LA FACULTÉ DE DROIT D'ISTANBUL.—This is a new journal on the law of Turkey published by the Law School of Istanbul with contributions in English, French, and German.

BULLETIN DE DROIT TCHÉCOSLOVAQUE.—This French language journal from behind the Iron Curtain has started a new policy of giving summaries of the contents in English. The April 1951 issue has in the Appendix a French translation of the new Civil Code of Tchecoslovakia of 1950.

DOCUMENTATION JURIDIQUE ÉTRANGÈRE, *Belgium.*—This mimeographed publication of the Service de Législation Étrangère, Ministère des Affaires Étrangères et du Commerce Extérieur, Belgium, has adopted a classification or key system for the entries in its Bulletin.

IN MEMORIAM

GEORGE M. WUNDERLICH died on the 7th of December 1951 in Washington, D. C., after a long illness. Well-known as an authority on private international law in Germany before Hitlerism brought him to the United States, he continued to be active in his field in this country. He lectured for a time at the University of Pennsylvania Law School on Comparative Conflict of Laws. During the war he served as consultant to Government agencies in Washington. He was an Honorary Vice-President of the American Branch of the International Law Association.

JEAN-PAULIN NIBOYET, a leading authority in France on private international law, died of a heart attack, the 2nd of March, 1952.

Professor at Paris since 1929, representative of France in many international conferences, professor at the Hague Academy, president of various associations of jurists, such as the *Comité Français de Droit International Privé* and the *Société de Législation Comparée*, member of many others, he had been entrusted with the difficult task of writing a project of codification of French private international law to be submitted to the Committee for the Reform of the Code Civil for discussion.[1] In this last respect, as well as in others, his career may be compared to that of Professor Beale in this country, and it is not without significance that the French translation of the Restatement, Conflict of Laws, was prefaced by Niboyet.

A brilliant teacher, he was also an organizer. Not only did he plan the creation of the *Comité Français de Droit International Privé*, which came into being in 1934 and whose valuable debates, except for the war period, have been published ever since, but his persistent efforts led, more recently, to the establishment of a *Centre Français de*

[1] Niboyet's draft, as discussed by the Committee, is commented upon in Delaume, "A Codification of French Private International Law," 29 Can. B. Rev. (1951) 751 *et seq.*

Droit Comparé. Together with Albert de Lapradelle, he was the editor of the *Répertoire de Droit International*, and with Paul Goulé he prepared the very handy *Recueil de Textes Usuels du Droit International*. Since 1934, he was the editor of the *Revue Critique de Droit International*, always welcoming the contributions of foreign lawyers, among others those of Lorenzen,[2] Beale,[3] and Judge Goodrich.[4] His own publications are innumerable. They include dozens of articles and case annotations and several books on private international law, of which we may specially mention his first *Manuel de Droit International Privé* (1928), his *Cours de Droit International Privé Français* (2nd ed., 1949) at the Faculty of Law in Paris, and his *magnum opus*, his *Traité de Droit International Privé Français* in six volumes (1938–1950), which is at present the most comprehensive treatise on French private international law, partly in the second edition.

His doctrine is based on a few dogmas systematically developed with all their logical consequences. His fundamental idea is that a conflict of laws rule should be based on the principle of territoriality and that a relationship once created according to the law of a country should be recognized by other states, except when contrary to public policy. Although Niboyet was a French author and wrote mainly for the French public, he had the feeling that his views could be adopted in any country. Fortunately, in his last article, translated into English by one of his former foreign students who had become his friend,[5] Niboyet has expressed his conviction concerning the universal value of his theory. As he stated in the Preface to the French edition of the Restatement: "The presentation of the American Restatement to the French public is thus an excellent occasion to show, as in a mirror, the system (of law) which should still be that of France, but which, above all, can become so again. It is our true, traditional law which returns to us, more or less, from over the Atlantic. Let us learn it again in this book which, from abroad, offers us the spirit of the genuine French tradition."

G. R. DELAUME

[2] "Story's Commentaries on the Conflict of Laws, One Hundred Years After," 30 Revue Critique (1935) 295 *et seq.*

[3] "Summary," 32 Revue Critique (1937) 1 *et seq.*, 393 *et seq.*

[4] "Yielding Place to New: Rest Versus Motion in the Conflict of Laws," to be printed in the next issue of the Revue Critique.

[5] "Territoriality and Universal Recognition of Rules of Conflict of Laws," 65 Harv. L. Rev. (1952) 582 *et seq.*, translation by Kurt H. Nadelmann.